MISSISSIPPI LAW JOURNAL

THE ADMINISTRATION OF JUSTICE: A SYMPOSIUM ON FEDERAL AND STATE COURTS

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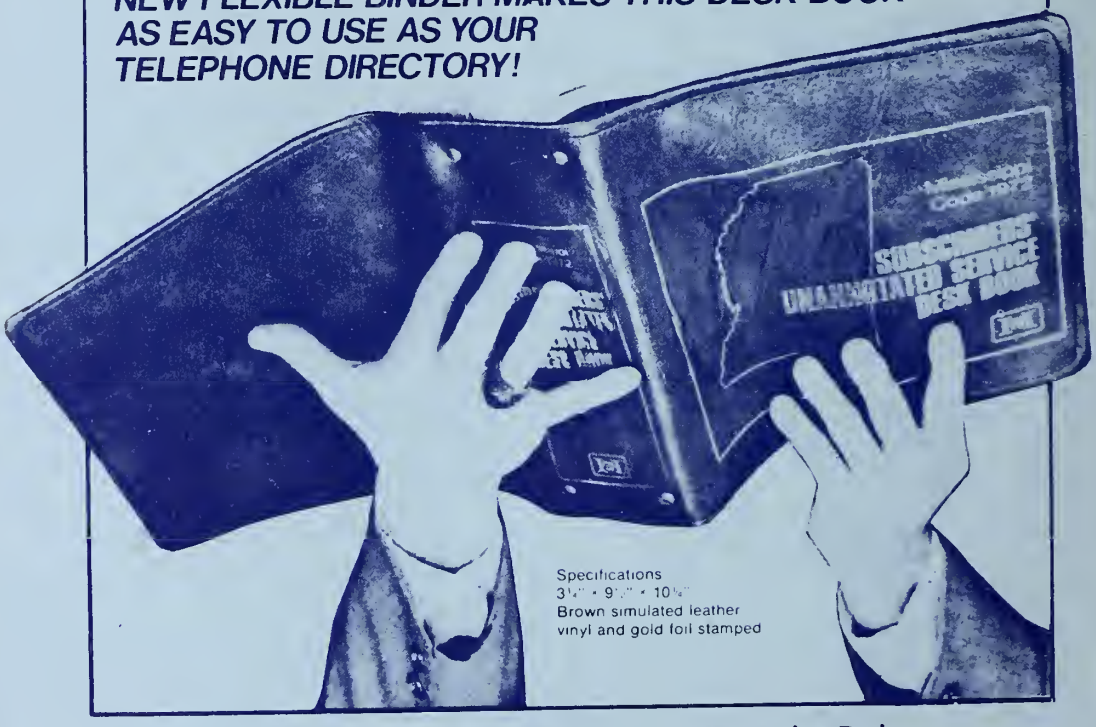

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THE ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS: AN INTRODUCTION

*The Honorable William C. Keady**

From the vantage point of the federal court system, the *Mississippi Law Journal* could not have chosen a more propitious time for its Symposium on the Administration of Justice. Since 1968, the number of cases commenced in the federal district courts has increased at an average annual rate of over 5 percent, and the pace is quickening; in the past year, filings have risen 14 percent.[1]

In our two-judge district court in the Northern District of Mississippi, almost 12 percent more cases were filed in fiscal 1974 than in 1973;[2] and civil filings in the first half of fiscal 1975 are running a full 11 percent ahead of a year ago.[3] Litigants are today entering our court at a rate more than 50 percent greater than a mere 6 years ago, while our judicial manpower remains unchanged.[4]

Unfortunately, ours is all too typical of the plight in which most federal district courts now find themselves—and in some, the pressure of swelling dockets threatens the destruction of an orderly judicial process. In the District of Massachusetts, for example, six federal judges labor with a caseload that is one of the heaviest in the nation and are unable to dispose of an average civil case until 18 months after its filing. In the Southern District of New York, with 27 judges, the story is the same.[5]

In the courts of appeals, the pressure is, if anything, even greater. Nationally, filings have risen 60.4 percent in the last 5 years;[6] in our Fifth Circuit, the increase has been a phenomenal 86.8 percent.[7] And all of this increase has been absorbed by a federal appellate system which has added not a single judgeship.

Acting in obedience to the felt need for ensuring federal criminal

---

* Chief Judge, United States District Court, Northern District of Mississippi.

[1] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, SEMI-ANNUAL REPORT OF THE DIRECTOR 12 (1975).

[2] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS 13 (1974).

[3] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 1, at 13.

[4] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORTS OF THE DIRECTOR (1968-1974).

[5] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR Table C-5, at 421-22 (1974).

[6] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 2, at 13.

[7] *Id.* at 5.

defendants a prompt hearing, Congress has recently enacted the Speedy Trial Act,[8] which will eventually require criminal defendants to be brought to trial within 100 days of their arrest. Unhappily, though, in at least one district, criminal defendants do not now receive final disposition of their charges in the trial court for more than a year; and two-thirds of the 94 district courts now take longer than the impending statutory maximum.[9] A planning group will soon be convened in each federal judicial district throughout the nation to study the operations of the courts of the district and recommend adequate procedures to assure compliance with the new congressional act.

Given the steady increase in the federal caseload and congressional reluctance to increase the number of federal district judges, it is evident that more imaginative and efficient methods of judicial administration must be employed to avert intolerable delays of justice or, more ominously, only superficial treatment by overburdened trial courts. Various new techniques have been recently devised to meet the challenge.

First, in our district, and in others as well, the use of a multiple voir dire, in which all petit juries for a week or even longer period of time are selected on the first day rather than before each trial, has dramatically reduced the burden on prospective jurors as well as cost to the government and resulted in substantial savings of judicial time and energy without diminishing the quality of justice. Multiple jury selections frequently promote settlements or guilty pleas more quickly than would otherwise be the case. Despite objections by some attorneys, the multiple voir dire examination is destined to replace the more time-consuming and wasteful single jury selection method for the trial of most cases.

Second, the recent institution of district-wide trial juries in criminal cases, in the place of trials at four separate divisions, has already speeded disposition of criminal cases in the Northern District of Mississippi. Oxford, as the geographical center of our district, and having excellent facilities for the court, jurors, witnesses, and attorneys, is the logical place to hold criminal trials with district-wide juries. More frequent use of grand juries, already established on a district-wide basis, will be required to comply with future trial-time requirements.

Third, the increased use of the United States Magistrates in matters for which they are statutorily qualified has also relieved federal judges of many time-consuming chores which can be handled equally well by these judicial officers. Magistrates who exercise a full range of duties are valuable adjuncts to the federal judiciary. Hopefully, the

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[8] Pub. L. No. 93-619, 88 Stat. 2076 (Jan. 3, 1975).

[9] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *supra* note 5, Table D-6, at 479-81.

Congress may increase the powers of full-time magistrates to allow them greater authority in conducting evidentiary hearings in post-conviction proceedings instituted by state and federal prisoners.

Fourth, the pretrial conference between the court and counsel, where conducted after counsel have had full exchange of pertinent information and are in position to enter into maximum stipulations, remains an effective means for identifying those cases which will go to trial and those which are headed for settlement. The development of more meaningful pretrial conference procedures to accomplish these purposes, and to protect the trial calendar, will require the cooperative efforts of the judge, the clerk of court, and counsel in the case. These efforts must be expanded to overcome the logjam which results from routinely placing all cases on the trial calendar.

Fifth, still another innovative procedure which carries great promise for expeditious handling of criminal matters is the inauguration of the omnibus hearing procedure, which combines and resolves in one pretrial hearing most or all matters ordinarily raised before and at trial. In the Western District of Texas and the Middle District of Florida, where omnibus is now employed on a voluntary basis, the procedure has reduced or eliminated written motions, allowed the court to rule on all standard motions at a single hearing, and permitted the assertion or waiver of legal claims or defenses by the prosecution or defense at an early stage of the prosecution. Omnibus also facilitates pretrial discovery by the voluntary disclosure of information by both the prosecution and defense, thus simultaneously satisfying the Jencks Act[10] and *Brady v. Maryland*[11] requirements and enabling the defendant to make an informed decision on whether to plead guilty or proceed to trial. Omnibus, although as yet restricted in format to criminal cases, also has exciting application to the civil docket. One can visualize the day when all pretrial matters, including motions and discovery disputes, can be resolved at one or two well-planned conferences between opposing counsel and either the trial judge or a magistrate.

Finally, a word as to plea bargaining, for of all the methods utilized to expedite criminal prosecutions, none evokes more emotional response than plea bargaining. For many, plea bargaining is a disgraceful practice which coerces guilty pleas by the threat of lengthy prison terms for those who exercise their right to trial. Critics also argue that the system permits the guilty to escape deserved punishment by pleading to reduced charges, and that it usurps the judicial sentencing function. Apologists for plea bargaining claim that it approximates the justice obtained through a criminal trial and that our criminal justice system, in

[10] 18 U.S.C. § 3500 (1970).

[11] 373 U.S. 83 (1963).

which almost 90 percent of all criminal prosecutions are terminated by guilty pleas,[12] would collapse without it.

Whatever its moral and philosophical underpinnings, plea bargaining is a fact of life in many metropolitan districts where speedy trials would otherwise be difficult or impossible to obtain. Moreover, although plea bargaining in the federal system is now within the discretion of the trial judge, pending amendments to the Federal Rules of Criminal Procedure, if approved by Congress, would mandate a plea bargaining procedure in all federal district courts, irrespective of prevailing docket conditions and the trial judge's wishes. The essential difficulty with plea bargaining is that it poses most clearly the problem inherent in all proposals at improving and streamlining the processes of judicial administration—the reconciliation of conflicting considerations of justice and the realities of the strain which the system can bear. It is not a problem that will ever be resolved to everyone's satisfaction.

The challenge facing federal courts is not merely one of making more efficient use of available resources so as to minimize the dollars and cents cost of federal justice. For as we have come to recognize, any discussion of judicial administration is, basically, an inquiry into the quality of justice. Justice delayed is often justice denied; it is always justice vitiated. Justice dispensed by judges too overburdened to grant each case the attention it deserves is not justice at all. That is why symposia such as this are vital to an effective judiciary, and why I feel privileged to participate in this manner.

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[12] NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 42 (1973).

FEDERAL ABSTENTION: NEW PERSPECTIVES ON ITS CURRENT VITALITY

*Allan Ashman**
*James J. Alfini***
*Robert A. Shapiro****

An increasingly important aspect of the administration of justice in the United States today is the way power is distributed between the federal and state judiciaries. If federal and state judicial systems are to administer justice fairly and effectively, there must be certainty with respect to the extent of their jurisdiction and how it is to be exercised. To be sure, the possibility of conflict developing between the federal and state judiciaries over alleged jurisdictional usurpation is unlikely and no longer poses the threat it did in the early days of this country.[1] Other equally important factors, however, argue for certainty in this area. For example, litigants should have the opportunity to determine which judicial system—state or federal—is both equipped and inclined to hear their case and render a verdict without unnecessary delay. Also, greater certainty in this area would result in a conservation of legal and judicial energies; energies unnecessarily expended when a case is shuttled back and forth between the federal court and a state forum.[2] Finally, the unconscionable delays and increased costs which result from such uncertainity can only result in a diminished respect for our judicial systems.[3]

Yet, in recent years, developments within the federal judicial system have contributed to even greater uncertainty as to the distribution of power between the federal and state judicial systems. The most significant development appears to be the dramatic increase in the workload

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[1] *See* R. Berger, Congress v. The Supreme Court (1969); C. Haines, The Role of the Supreme Court in American Government & Politics 1789-1835 (1960).

[2] *See, e.g.*, American Law Institute, Study of the Division of Jurisdiction Between State & Federal Courts 283-84 (1969) [hereinafter cited as ALI Study].

[3] *Id. See also* Note, *Consequences of Abstention by a Federal Court*, 73 Harv. L. Rev. 1358 (1960); Comment, *Abstention: A Case Against Forum-Shuttling*, 22 J. Pub. L. 439 (1973).

of the federal district courts. Some commentators believe that this increased workload has reached the crisis stage. Henry J. Friendly, former Chief Judge of the United States Court of Appeals for the Second Circuit, has stated that "the inferior federal courts . . . are faced with the prospect of a breakdown . . . they now have more work than they can properly do—including some work they are not institutionally fitted to do."[4]

In trying to combat the "crisis" of court congestion, many of the more overburdened federal district courts have searched for new ways to exercise greater control over their dockets. This article concerns itself with the one approach which threatens to throw the distribution of power between the federal and state judiciaries into total disarray. Specifically, the article focuses upon the increased use of federal trial court discretion to defer the resolution of cases otherwise properly before them to the appropriate state forums. These cases often are deferred for reasons which are based solely on considerations of judicial economy or convenience; *i.e.*, to ease the congestion of the federal court and ostensibly promote the more efficient administration of justice.

This discretionary power of the federal judge derives from a judicially developed concept commonly known as the abstention doctrine. One leading commentator, Professor Charles Alan Wright, believes that abstention is a multifarious concept and has attempted to define the "abstention doctrines" by identifying the various situations in which federal courts have declined to proceed with a case even though they have jurisdiction under the Constitution and the statutes. Specifically, Professor Wright observes that

> abstention is variously recognized: (1) to avoid decision of a federal constitutional question where the case may be disposed of on questions of state law; (2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket.[5]

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[4] H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 3-4 (1973). Apparently, an important factor contributing to the increased workload of federal district courts is the dramatic increase in filings in classes of cases which require more than an average amount of judicial time for disposition. Accordingly, the Administrative Office of the United States Courts has devised a scheme of "weighted filings" for making workload comparisons. Between 1962 and 1973, the total annual weighted filings *per district court judgeship* increased from 242 to 343. ADMIMISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 317 (1974) [hereinafter cited as ANNUAL REPORT].

[5] C. WRIGHT, LAW OF FEDERAL COURTS 196 (2d ed. 1970). For the sake of convenience, we shall adopt Wright's analysis and refer to each of these factors by number, as one of the four "abstention doctrines" throughout this article.

There is considerable disagreement over the advisability of allowing abstention in cases which fit into one or more of these four categories. Some commentators would prefer to dispense with federal abstention altogether,[6] while others believe that federal abstention should be required whenever an action has already been initiated in a state court and the rights of all parties can be resolved in that forum.[7] Professor Wright believes abstention is justified whenever it serves the purposes of federalism.[8] He argues, however, that decisions which invoke the "fourth abstention doctrine" (easing the congestion of the federal court docket) go "beyond anything that has been sanctioned by the Supreme Court, and beyond anything required by the demands of federalism."[9]

The one point commentators appear to agree on is the need for greater certainty in this area. The circumstances under which abstention is justified are not clearly defined by existing case law. In an effort to provide more certainty, the American Law Institute (ALI) has proposed a codification of abstention.[10] The ALI proposal defines a narrow class of cases under which federal abstention would be allowed, excluding the class of cases which would fall under Professor Wright's "fourth abstention doctrine."

Despite the controversy, a number of federal district courts continue to defer to the state courts in cases where the sole criterion for invoking abstention is the need to ease congestion of the federal court docket. Our purpose is to analyze this line of cases, attempting in the process to assess the attitudes of the federal district court judges towards federal abstention as a means of furthering not only the ends of federalism, but the more practical ends suggested by the "fourth abstention doctrine."[11] Finally, this article suggests a solution which the authors believe will serve both the traditional demands of federalism and the current needs of the federal courts.

I. Cases Invoking the "Fourth Abstention Doctrine"

The power of a federal district court judge to utilize the abstention doctrine is probably least supported when the reasons for that decision

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[6] *See, e.g.*, Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 268, 317 (1969); Comment, *supra* note 3, at 462.

[7] *See, e.g.*, Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 491 (1960).

[8] Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 815, 826 (1959).

[9] C. Wright, *supra* note 5, at 205.

[10] ALI Study, *supra* note 2, at 48-49.

[11] The attitudes of the federal judges were assessed by analyzing the results of a questionnaire sent to United States District Court judges in the fall of 1974. See note 86 *infra*.

are based on considerations of judicial economy or convenience.[12] While there has been no definitive United States Supreme Court decision on the propriety of a federal district judge's exercise of discretion in this instance, there has been significant language in Supreme Court opinions,[13] as well as numerous lower court decisions, which raises judicial economy as an important factor to be considered in making the abstention decision.

Perhaps as a direct consequence of their burgeoning caseloads, many courts in recent years have explored the limits of their discretionary power to stay their hand in cases otherwise properly before them. The relevance of judicial economy and convenience has been an increasingly recurrent element in these discussions. The ensuing analysis will focus on those cases in an attempt to explain the posture of the various circuits in evaluating the importance of judicial economy when determining whether to abstain.

Many of the recent cases draw heavily from the language of a 1936 Supreme Court opinion written by Justice Cardozo in *Landis v. North American Co.*[14] For two reasons it is unfortunate that such reliance has been placed on *Landis*. First, the action in *Landis* involved suits pending simultaneously in two *federal* courts. The litigation involved the validity of the Public Utility Holding Company Act of 1935. Numerous suits were brought both by the Securities Exchange Commission to enforce the registration provisions of the Act and by utilities to enjoin enforcement of the Act on the basis of its purported unconstitutionality. Second, the Court denied the stay in *Landis*, pending the determination of a suit in another district to test the constitutionality of the Act and a definitive review by the Court on appeal. The fact the stay was denied in *Landis* would seem to limit its precedential value. Yet, the following statement by Justice Cardozo in *Landis* often is cited:

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.[15]

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[12] *See* C. WRIGHT, *supra* note 5, at 205.

[13] In a recent dissenting opinion, Chief Justice Warren Burger observed:

> I quite agree that there is no absolute duty to abstain . . . until the state courts have at least been asked to construe their own statute, but for me it is the negation of sound judicial administration—and an unwarranted use of a limited judicial resource—to impose this kind of a case on a three-judge federal district court, and then, by direct appeal, on this Court . . . .
>
> This Court has an abundance of important work to do, which, if it is to be done well, should not be subject to the added pressures of non-urgent state cases which the state courts have never been called on to resolve.

Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971).

[14] 299 U.S. 248 (1936).

[15] *Id.* at 254.

Another major United States Supreme Court statement on the discretionary power of the district judge in this area is contained in *Brillhart v. Excess Insurance Co. of America*.[16] In this action, the Excess Insurance Company brought a suit under the Federal Declaratory Judgment Act to determine its rights under a reinsurance agreement. This suit was preceded by a garnishment proceeding in the Missouri state court seeking to dismiss the federal suit on the ground that the issues involved could be decided fully in the state garnishment proceeding. The Court agreed that a dismissal was within the discretion of the district court, observing:

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.[17]

Like *Landis*, it would be incorrect, for at least two reasons, to cite *Brillhart* as precedent for the power of a district court to abstain in a pending case for reasons of judicial economy. First, *Brillhart* involved a suit for declaratory relief. It says nothing about the court's power when two diversity suits are involved, or even when the federal relief sought is equitable in nature. Second, the defendants in *Brillhart* sought, and were granted, a *dismissal* of the federal cause of action. When abstention is exercised, the usual procedure involved is that the federal court retains the case on its docket pending the outcome of the state proceeding.[18]

Nevertheless, *Brillhart* cannot be totally discounted. Unlike *Landis*, it involved both a state and a federal suit. In addition, because the Court held the stay was proper, the quoted language from the opinion must be considered as more than dictum.

Although the United States Supreme Court has not stated authoritatively that a district court may stay its hand in any case before it because of a crowded docket, many lower federal court decisions have supported this proposition. Most of the impetus for such decisions has come from two cases decided in the Second Circuit. The first case,

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[16] 316 U.S. 491 (1942).

[17] *Id.* at 495.

[18] In one of the first abstention cases, Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), the Supreme Court specifically ordered the district court to retain jurisdiction of the case while it was being litigated in the state courts. In cases where the Court has invoked *Pullman*-type abstention, it has explained that "[t]his principle does not, of course, involve the abdication of federal jurisdiction but only the postponement of its exercise . . . ." Harrison v. NAACP, 360 U.S. 167, 177 (1959).

Mottolese v. Kaufman,[19] was a shareholder's suit brought in federal court by the same attorneys who brought nine previous shareholders' suits in the state courts. The United States Court of Appeals for the Second Circuit held it would be a proper exercise of discretion to stay the federal suit considering the similarity of issues and parties. Recognizing one advantage of the federal forum, the stay was conditioned upon the state court granting the plaintiff the benefit of the federal pretrial examination procedures.

One year later, a federal district court in New York had the opportunity to explain and expand the *Mottolese* holding. This opportunity came when Duke Laboratories, Inc. sued P. Beiersdorf & Company, Inc. in a Connecticut state court. Duke sought a declaratory judgment that it had not infringed certain registered trademarks, that it owned these trademarks although they had been issued to Beiersdorf, and that a contract between the parties (relative to the manufacture and distribution of the articles under the trademarks) was either invalid or had been completely performed. While the state suit was pending, Beiersdorf sued Duke in the United States District Court for the Southern District of New York for trademark infringement, for breach of contract, and for an accounting.[20] Duke then sought an order to stay the federal suit until the completion of the trial in the state court.

The district court granted the order, stating initially that "[t]he statutory privilege of access to a federal court is no longer regarded as absolute." Citing *Landis*,[21] the court explained that the question of whether a court should stay proceedings before it is determined by the sound exercise of its discretion.

More importantly, the court stated:

> The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.[22]

Beiersdorf appealed the district court's decision by filing a writ of

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[19] 176 F.2d 301, 303-04 (2d Cir. 1949).

[20] P. Beiersdorf & Co. v. Duke Laboratories, 92 F. Supp. 287 (S.D.N.Y. 1950).

[21] Landis v. North Am. Co., 299 U.S. 248 (1936).

[22] 92 F. Supp. at 288, *quoting* Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941).

mandamus to issue against the district court judge.[23] But the Second Circuit affirmed the district court opinion on the authority of *Mottolese*. In a vigorous dissent, Judge Clark argued that the affirmance would cede to district judges "a wide power to pick and choose among the cases to be heard federally."[24] He doubted that congestion alone was an adequate ground for denying jurisdiction. Finally, in distinguishing *Mottolese* Judge Clark implied that the discretionary power of the district judge recognized in *Mottolese* would not extend to matters dealing with a "federal speciality," such as trademarks.[25]

The language found in *Mottolese* and *Beiersdorf* has provided the stimulus for a number of federal district courts to consider the issue of judicial economy in deciding whether to abstain.[26] It appears that the only limitation which has been placed on this discretionary power by these early cases is that the state and federal suits involve the same issues and the same parties.

The district courts in the Second Circuit generally seem to be faithful to the ruling in *Beiersdorf*. In 1959 the *Beiersdorf* doctrine was affirmed by the United States District Court for the Southern District of New York in *Weiss v. Doyle*.[27] In facts reminiscent of *Mottolese, Weiss* involved a stockholder's derivative suit brought in federal court under diversity jurisdiction. At the time when the derivative action was instituted, five other federal actions and nine state suits were pending, all with the same corporation as a defendant. The corporation moved to stay the federal action after eight of the state court actions had been ordered consolidated or stayed. The district judge granted the stay.

Observing the similarity of the issues involved in the various suits, the judge felt the court would be deluged if they were allowed to proceed apart.[28] The opinion then concluded:

> Court congestion today, as always, is a matter of major concern in the administration of justice and to permit this action to continue, . . . would be to add unnecessarily to that congestion and to delay other

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[23] P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951).

[24] *Id.* at 15.

[25] *Id.* at 16.

[26] It is interesting to note Judge Frank's ambivalence in writing the court of appeals decision in *Beiersdorf*. He noted his dissent in *Mottolese*, but felt that decision was "so sweeping" that it must be followed in *Beiersdorf*. His express hope was that the Supreme Court would "grant review and reverse this decision, which involves an important problem of federal jurisdiction." *Id.* at 15.

[27] 178 F. Supp. 566 (S.D.N.Y. 1959).

[28] Note that the court of appeals required only that the causes of action in the various suits be "substantially the same and center about the same transactions . . . ." *Id.* at 568. This standard departs from any rigid standard requiring identity of parties, causes of action, or issues.

> litigants who await trial and for whom no other avenue of relief is available. To be sure, the congestion alone is no ground for denying a litigant access to courts. But here, the corporation has ample opportunity to redress its grievances in the consolidated state court action, which counsel for the plaintiffs were themselves prepared to advance there had they been favored with the general counselship.[29]

Three years later, in *Martin v. Martin*,[30] the Southern District again stayed an action because of considerations of judicial economy. The state suit was pending in the New York Surrogate's Court at the same time the executors brought an action for accounting and distribution of the estate. The district court granted the stay pending the outcome of the Surrogate's action. Again, identity of the causes of action was a critical factor in the court's decision. The court observed that it would be a "waste of judicial time" to have both the state and federal actions proceed simultaneously.[31]

Significantly, the state action in *Martin* was a probate proceeding, where the Surrogate's court already had control over the estate. While the power of a federal court to stay its hand because of duplicative litigation has not been universally accepted when the action is brought in personam, few courts have challenged this discretionary power when the state court already has jurisdiction of a res.[32] Indeed, the district court in *Martin* specifically supported the stay on the ground that the state court had "prior quasi in rem jurisdiction."[33] But it should be noted that probate matters generally have been considered to be a matter which is peculiarly within the province of the state courts.[34]

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[29] *Id.* at 570 (footnote omitted).

[30] 210 F. Supp. 776 (S.D.N.Y. 1962).

[31] *Id.* at 778.

[32] *See, e.g.*, Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466 (1938).

[33] 210 F. Supp. at 778-79.

[34] The leading case which excepts probate of wills and administration of estates from federal jurisdiction is *In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1875). However, when an appropriate jurisdictional basis is present, federal courts do entertain actions *inter partes* brought against the administrator or an executor of an estate by an individual who purports to have a claim against the decedent or a right to the proceeds of his estate. Markham v. Allen, 326 U.S. 490 (1946); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909). The only proscription on the federal court is that it cannot order the actual distribution of the estate, as the property thereof is in the custody of the state courts. Byers v. McAuley, 149 U.S. 608 (1893).

In this connection, it is significant to note that the Second Circuit, in Simmons v. Wetherell, 472 F.2d 509 (2d Cir.), *cert. denied*, 412 U.S. 940 (1973), refused to stay an action in a condemnation dispute, which the condemnee had unsuccessfully tried to abort in the state courts. The court of appeals pointed to the essential nature of the suit as being a boundary dispute, which is "a matter traditionally within the purview of the state courts." 472 F.2d at 512.

In 1973, the Second Circuit explicitly reaffirmed the teachings of *Mottolese* and *Beiersdorf*. *Klein v. Walston* & Co.[35] involved a fraud action brought under the Securities Exchange Act of 1934 for a transaction that took place in 1959. A state court action based on common law claims had been pending in the state courts since 1964. The Second Circuit said the district court was within its discretion in staying proceedings until the final determination of the state court. Referring to *Mottolese* the court observed: "Particularly in these days of congested calendars the judge was amply justified in not allowing litigation of these hoary claims to occupy the energies of two courts at the same time."[36]

Klein has added interest in that it departs even further from the *Beiersdorf* requirement that the state and federal suits involve the same issues and the same parties. Because the jurisdiction of the federal courts is exclusive in matters relating to the Securities Exchange Act, the pending state suit in *Klein* included only common law counts. Nevertheless, the Second Circuit reasoned that while the state court could not resolve claims under the 1934 Act, it could authoritatively determine the common law claims and defenses such as res judicata and statute of limitations that might also be dispositive of the 1934 claims.[37]

Several cases, however, have attempted to limit an expansive reading of *Mottolese* and *Beiersdorf*. Typical is a United States District Court decision in a case involving parallel suits in the state and federal courts for copyright infringement and unfair competition.[38] The district court denied a motion to stay the federal suit, even though the action in the state court was brought first. Interestingly, the opinion cited another passage from the *Landis* decision:

> [T]he suppliant for a stay [of the type sought here] must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.[39]

The district court felt the defendant had not shown the requisite "case of hardship or inequity" to overcome the "damage" the plaintiff would incur. The court felt the plaintiff would be "damaged" or prejudiced by a stay of the federal action because the state proceeding might not "be dispositive of at least the 'controlling issues' in the federal

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[35] 432 F.2d 936 (2d Cir. 1970) (per curiam).

[36] *Id.* at 937.

[37] *Id.*

[38] Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F. Supp. 72 (S.D.N.Y. 1962).

[39] *Id.* at 73, *quoting* Landis v. North Am. Co., 299 U.S. 248, 255 (1936).

action."[40] The district court derived this requirement from an earlier Second Circuit case[41] in its attempt to distinguish and limit *Beiersdorf* and its progeny.

In 1970, the United States District Court for the District of Connecticut also examined the weight to be given to the federal forum's judicial economy rationale. In *Assmann v. Treglia*,[42] the defendant was faced with two personal injury suits. Unlike many of the other cases discussed, the federal suit was brought *before* the state suit. This was one of the factors which the district court cited in denying the stay. The court also pointed to the fact that it did not appear the proceeding could be more speedily and effectively prosecuted in state court than in federal court. Finally, the district judge was concerned that a relegation of the plaintiff to the state forum would result in a deprivation of the advantages of the broad federal discovery proceedings.[43]

Perhaps the most severe challenge to the vitality of *Mottolese* and *Beiersdorf* came in *Ungar v. Mandell*,[44] decided in 1972 by the Second Circuit. Suit had been brought in the district court over an agreement between the two parties to settle claims pending in the state courts. The plaintiff brought the federal suit alleging breach of this agreement. Specifically, he sought relief in the form of specific performance of the alleged agreement to settle the state claims or, alternatively, injunctive relief to prohibit the state foreclosure action. The district court dismissed the suit thereby denying both forms of relief.

While the Second Circuit believed injunctive relief was properly denied on the basis of the federal anti-injunction statute,[45] it did not think the balance of the complaint should have been dismissed. The Second Circuit, recognizing the district judge's dilemma, characterized the federal suit as

> a glaring example of the waste, duplication and vexatiousness that can be perpetrated through utilization of available diversity jurisdiction during the pendency of state court litigation in which identical issues are or can be raised.[46]

It felt the federal suit "serves no other purpose than to sidestep the

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[40] 211 F. Supp. at 73.

[41] Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir. 1955).

[42] 318 F. Supp. 1040 (D. Conn. 1970).

[43] *Id.* at 1041. Compare this to the approach taken in Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949), and Weiss v. Doyle, 178 F. Supp. 566 (S.D.N.Y. 1959), where the stay of the federal action was conditioned on the stipulation that the plaintiffs not be deprived of certain of the discovery opportunities available under the Federal Rules of Civil Procedure.

[44] 471 F.2d 1163 (2d Cir. 1972).

[45] 28 U.S.C. § 2283 (1970).

consequences of the state court litigation." While the Second Circuit was concerned with such "abuses" of the district court's jurisdiction, it felt it was improper to dismiss in light of the principle that "a federal court's power to abstain from the exercise of its jurisdiction is limited to narrow and exceptional circumstances, none of which are found here."[47]

Ungar can be distinguished from the *Mottolese* and *Beiersdorf* situations. In these earlier cases the issue was whether a *stay* should be granted. In *Ungar*, the judge ordered a *dismissal* of the cause of action. The court of appeals in *Ungar* seemed to grasp this distinction, for it reasoned that even if a *stay* was proper, jurisdiction could not be denied solely because the state court had concurrent jurisdiction. Similarly, an attempt was made to try to distinguish *Klein v. Walston & Co.*, on the basis that the state court litigation in *Ungar* had already been concluded, "thus eliminating the necessity for such a stay which would be granted primarily to avoid duplication of effort."[48]

Few would dispute the contention that a judge should take a more cautious approach in a decision involving the ouster of a case from the federal forum as opposed to a determination which would simply *stay* the action. Yet this distinction seems inconsistent with one of the major underpinnings of the abstention doctrine. Most of the cases allowing abstention where duplicative litigation is being conducted do so because the state and federal suits share common issues and common parties. By letting the state suit proceed, the federal court anticipates a result that can be asserted as res judicata or collateral estoppel in the federal proceeding. Hence, a decision to abstain in this context should be taken as seriously as one to dismiss when the operative concern is the plaintiff's "right" to a federal forum.

Aside from this conceptual difficulty, the Second Circuit's own language seemed to obfuscate the distinction it made between dismissals and stays. For example, the court talked about a federal court's power to "*abstain from exercise of its jurisdiction.*" Such language, particularly when juxtaposed with the court's strong language limiting the discretionary power of the district judge in handling diversity cases, would seem to cast doubt on the present usefulness of the notions contained in *Mottolese* and *Beiersdorf*.

The Second Circuit is not alone in giving weight to the needs of judicial economy. A 1974 Massachusetts district court opinion has drawn the First Circuit into this thicket. In *City of Chicopee v.*

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[46] 471 F.2d at 1165.

[47] *Id.* at 1166.

[48] *Id.*

Sullivan,[49] a suit was filed for declaratory and injunctive relief against allegedly unconstitutional provisions of a Massachusetts statute delineating the method by which to determine school aid. In dismissing the suit, the district court cited the fact that the plaintiffs had filed a suit in the state court relating to the same transactions and involving the same constitutional issues as those raised in the federal suit. Also, the court thought this suit was perhaps an impermissible attempt to circumvent the limits placed on the jurisdiction of the federal court by the eleventh amendment. Assuming the funds were improperly withheld, the court concluded that the issue of the state's liability for damages could be determined in the pending state action.

Ultimately, the court rested its decision on the fact that "considerations of comity" would suggest deference to the state forum, in which all of the issues could be resolved. But citing *Beiersdorf*, the court noted that "judicial efficiency and economy suggest that the issues in this controversy properly should be adjudicated in a single forum."[50] As yet, the United States Court of Appeals for the First Circuit has neither acquiesced in nor refuted this position. It should also be remembered that *City of Chicopee* involved a federal prayer for relief of a declaratory and injunctive nature, though the language of the case did not so limit the application of the opinion.

The United States Court of Appeals for the Fourth Circuit dealt with considerations of judicial convenience and economy in an interesting 1967 case, *Amdur v. Lizars*.[51] The plaintiffs in this action brought a shareholders' derivative suit in the federal court after bringing a similar suit in state court some 4½ years earlier. The state action, however, was in abeyance because the plaintiffs failed to post the sum required by the state "Security for Expenses" statute. Unsuccessful attempts had been made by the plaintiffs to dismiss the state suit because of the local judge's enforcement of the statute which prohibited dismissals "except with the approval of the court."

When the plaintiffs availed themselves of the federal forum, they opposed a motion to stay the suit, on the basis of their intention *not* to post the required bond in the state suit. Hence, the latter suit could hardly be considered pending since, in their words, it was no more than a "docket entry." The district court and Fourth Circuit were unpersuaded. Both courts granted the stay of the federal suit, giving an expansive meaning to the word "pending." Relying on *Mottolese* and an earlier Fourth Circuit decision,[52] the Fourth Circuit recognized the dis-

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[49] 379 F. Supp. 569 (D. Mass. 1974).

[50] *Id.* at 573.

[51] 372 F.2d 103 (4th Cir. 1967).

[52] International Nickel Co. v. Martin J. Barry, Inc., 204 F.2d 583 (4th Cir. 1953).

cretionary character of a federal district court's power to stay a diversity action during the pendency of a state court proceeding. The court was influenced by the advanced stage of the state court proceeding, pointing to the fact that numerous hearings and discovery had already taken place, and an answer on the merits had been filed.

In rejecting the plaintiff's argument that realistically, the state suit could not be considered "pending," the court explained that "the general theory underlying stay orders is the necessity of protecting the defendant from vexatious and uneconomical litigation . . . ."[53] The court believed the plaintiffs had the power to extricate themselves from their predicament. "They are not entitled to the federal court's assistance in playing fast and loose with the state courts, whose jurisdiction they have invoked and used extensively."[54] Thus, while the Fourth Circuit has not explicitly allowed district courts to take judicial economy into account when considering stays, the language of the *Amdur* case, together with the court's favorable view of the Second Circuit's approach would seem to indicate it might be receptive to a *Beiersdorf*-type rule in a future case.

The approach of the Fifth Circuit toward this issue appears typical of judicial attempts to balance the interest of judicial economy with the "right" of a plaintiff to a federal forum. One of the early cases confronting this issue was *Crawford v. Seaboard Coast Line R.R.*,[55] decided in 1968 by a Georgia district court. A diversity action was brought for wrongful death. A similar action was nearing completion in the state court. The district court stayed the federal action until the state suit was dismissed or finally determined on its merits. In granting the stay, the district court recognized:

> While parties have a right to this forum, granted under the diversity statute, they have no right to engage the court or their adversaries in wasteful activities when another forum is available where claimed grievances may be fully and fairly heard and a disposition made upon the merits.[56]

In formulating this principle, the court looked to the case law of the Second Circuit, placing emphasis on the *Mottolese* decision. But the court also based its decision on principles of judicial economy, drawing heavily on the *Landis* opinion. The district court explained:

> Court congestion today, as always, is a matter of major concern in the administration of justice and to permit this action to continue,

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[53] 372 F.2d at 107.

[54] *Id.* at 108.

[55] 286 F. Supp. 556 (S.D. Ga. 1968).

[56] *Id.* at 557, *citing* Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949).

> under the facts here presented, would be to add unnecessarily to that congestion and to delay other litigants who await trial and for whom no other avenue or [*sic*] relief is available. Congestion alone is no ground for denying a litigant access to courts, but here the plaintiff has ample opportunity to redress her grievances in the state court action. To permit her to proceed would not only involve duplicitous effort but would impose additional financial burden on the defendant.[57]

Thus, the district court in *Crawford* seems to have taken a rather broad view of the judge's discretion; a view similar to that espoused in some of the Second Circuit cases. The only restriction is that the party must have "ample opportunity" to redress his grievances in state court.

The United States Court of Appeals for the Fifth Circuit engaged the issue one year later in a suit arising out of an automobile collision involving three vehicles. The requirement of complete diversity made it impossible for all three parties to be brought in one federal suit. The district court stayed the federal suit pending the outcome of parallel state court actions, and the plaintiff brought a writ of mandamus challenging the court's ruling.[58] The Fifth Circuit affirmed the district judge's exercise of discretion, asserting "the ends of sound administration of justice" were served by the district judge's determination. The court emphasized that the district court involved "has one of the heaviest caseloads in the entire federal system . . . ."[59] But the Fifth Circuit refused to "express full accord" with the holdings of the Second and Fourth Circuits that it is not an abuse of the discretion of the district court to stay proceedings in diversity cases if there is a prior action involving the same dispute.[60] Instead, the court assumed the posture that, for this case, it was only necessary to say there was no abuse of discretion "to stay the federal actions which would at best conclude only a portion of the controversy."[61]

The Fifth Circuit further limited the discretionary power of the district judge in *PPG Industries, Inc. v. Continental Oil Co.*[62] Here, the federal action was for declaratory and injunctive relief. PPG Industries had previously tried to remove, unsuccessfully, a state suit in which it was named as defendant. In the federal suit, PPG sought declaratory relief with respect to its rights under a contract with Continental Oil. The complaint also sought injunctive relief to restrain Continental from

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[57] 286 F. Supp. at 557-58.

[58] Thompson v. Boyle, 417 F.2d 1041 (5th Cir. 1969), *cert. denied*, 397 U.S. 972 (1970).

[59] 417 F.2d at 1042.

[60] *Id.* The court specifically cited Amdur v. Lizars, 372 F.2d 103 (4th Cir. 1967), and Milk Drivers Local 338 v. Dairymen's League Co-Operative Ass'n, 304 F.2d 913 (2d Cir. 1962).

[61] 417 F.2d at 1042.

[62] 478 F.2d 674 (5th Cir. 1973).

performing actions which, purportedly, would constitute a breach of the contract. In approving the stay granted by the district court, the Fifth Circuit indicated that since the underlying nature of the declaratory suit was a prayer for equitable relief, the district court had the discretion to stay the suit in deference to parallel actions being conducted in Texas courts between the same parties and involving the same issues.

In reaching its decision, the Fifth Circuit first looked to whether the district court had discretionary power to issue a stay. Employing the United States Supreme Court decision in *Meredith v. City of Winter Haven*[63] as a starting point, Judge Thornberry concluded the pendency of a parallel state court action was not an "exceptional circumstance" that would warrant abstention. The court, however, reasoned that *Meredith* could not be fairly read as forbidding a federal court from staying an *equity* suit pending the outcome of a parallel state action. Reference was made to

> a policy against dual litigation which applies with equal force to declaratory actions and to ordinary equity suits, and which, though not included in the *Meredith* list of exceptional circumstances, has given rise to a discretionary power in the federal courts to stay proceedings in equity suits in deference to a parallel state action.[64]

The court also relied upon *Brillhart*, observing that the opinion shows a

> concern for economy of judicial time and a disinclination to encourage duplication of effort. In the decades since *Brillhart*, of course, the increasingly crowded dockets of the federal courts have magnified the importance of this practical consideration.[65]

After weighing these considerations, and in view of the fact that the state court was capable of determining this controversy, the Fifth Circuit concluded the district judge had not abused his discretion by granting the stay, but the court declined to "assent" to the proposition that the federal district court has the discretionary power to stay its hand pending the outcome of a parallel state action in cases that are legal rather than equitable or declaratory in nature. In addition, the Fifth Circuit refused to adopt the proposition that the power to stay is "part of the court's inherent power to 'control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for

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[63] 320 U.S. 228 (1943). In this case, the Supreme Court announced its requirement that abstention be exercised only in "exceptional circumstances." The Court also emphasized that "diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience." *Id.* at 234.

[64] 478 F.2d at 679.

[65] *Id.* at 680 (citations omitted).

litigants.' "[66] Thus, the Fifth Circuit seems to be an exception among the federal judicial circuits in that it has accurately applied the Supreme Court's language in the *Landis* decision, which dealt only with a situation involving two *federal* court actions.

The Seventh Circuit also explored the weight to be given court congestion and delay in *Aetna State Bank v. Altheimer*.[67] This case involved an action brought by a pledgee against a pledgor's estate for damages resulting from an alleged violation of rule 10b-5 of the Securities and Exchange Commission. An earlier deficiency claim had been asserted against the pledgor's estate in state court. The United States District Court for the Northern District of Illinois granted the defendant's motions in abatement and to dismiss. The United States Court of Appeals for the Seventh Circuit held the motion in abatement was properly granted, since all of the issues were before the state court but were not before the federal court. The court reversed the order to dismiss, however, viewing it as contradictory to the motion in abatement.

Initially, the court disposed of two preliminary matters, including the contention that the federal courts had exclusive jurisdiction over matters relating to the Securities Exchange Act of 1934. The Seventh Circuit reasoned that while a state court could not grant relief in a 10b-5 action, "nothing in that section prevents the state court from considering questions . . . which are introduced by way of defense, and failure to do so would violate the supremacy clause."[68] The court then addressed the confusion over the current vitality of a motion in abatement. While the court believed the motion had little vitality under the Federal Rules of Civil Procedure, it felt the advent of the abstention doctrine was "an outgrowth of the old common law plea of abatement . . . ."[69]

The bulk of the Seventh Circuit's opinion was devoted to an analysis of abstention as a means of promoting judicial economy. Citing *Landis* and the decisions of other circuits, the court observed that

> [a] stay pending the outcome of the litigation in another court between the same parties, involving the same or controlling issues is an acceptable means of avoiding unnecessary duplication of judicial machinery.[70]

In looking to the other circuits, the opinion conceded that most of the cases involved preliminary or injunctive relief. Nevertheless, the court found "a pattern of discretionary power running through all of the cases

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[66] *Id.* at 682, *quoting* Landis v. North Am. Co., 229 U.S. 248, 254 (1936).
[67] 430 F.2d 750 (7th Cir. 1970).
[68] *Id.* at 754, *quoting* 2 L. Loss, Securities Regulation 977 (2d ed. 1961).
[69] *Id.* at 754.
[70] *Id.* at 755.

involving abstention from the exercise of jurisdiction."[71] The court concluded by confronting the issue of court congestion directly:

> We need cite no cases nor set forth any statistics on the obvious fact of the ever increasing work load on our courts, both state and federal. It is a salutary doctrine in our opinion which permits, when the same issues and same parties are involved in two courts, even though those courts have concurrent jurisdiction, one court to have the discretion to direct by an appropriate stay order that the litigation be confined to one forum.[72]

Although the United States Court of Appeals for the Seventh Circuit has spoken in perhaps the broadest terms of any federal court, the district courts within the Seventh Circuit appear reluctant to exercise their new-found discretionary power. Two cases decided by the United States District Court for the Eastern District of Wisconsin are illustrative. In one case, a diversity action stemming from an automobile accident, stay of the federal suit was denied, largely because the parallel state suit had been instituted 7 months *after* the federal suit.[73] In addition, other factors were present which convinced the district court the state court would not provide a speedier or more economical adjudication. For example, the plaintiff intended to dismiss the state court suit if the state court defendant could be impleaded in the federal suit. Also, the plaintiff's further dissatisfaction with the state proceeding was evidenced by her efforts to secure a change of venue.

The court refused the stay on rather fundamental grounds. First, it repeated the maxim that concurrent litigation involving in personam matters will not be stayed at least until judgment is obtained in one action, so that it might be res judicata in the other action.[74] Second, the court accepted the proposition that the district court has discretionary power and an important aspect of the exercise of such power is the need

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[71] *Id.* at 756.

[72] *Id.* The court looked favorably upon the observation of one commentator:

> [T]he courts have discretion in the manner in which they will handle the problem of judicial administration. They need not use a mechancial test such as priority of actions as used in abatement under the traditional view. There is a certain degree of discretion regarding how cases will be handled in the interest of justice. This power of the courts includes the power to stay or hold or to dismiss. Courts in using this power will consider the interests of the litigants, the courts, and the witnesses.

Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525, 540 (1960). Referring to this passage, Judge Pell commented: "[T]his would appear to be becoming increasingly appropriate as the workload of the court increases . . . ." 430 F.2d at 755.

[73] Mahkimetas v. Dascola, 336 F. Supp. 689 (E.D. Wis. 1971).

[74] *Id.* at 690, *citing* Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456 (1939).

to "avoid unnecessary duplication of judicial machinery."[75] But the court was persuaded by the fact that the federal action antedated the state action, and hence declared there should be "no short shrift of litigants who are properly before the federal forum of their choice without compelling reasons."[76]

The district court still refused to give an expansive reading to *Aetna* in the other case, an action seeking damages for alleged violations of the 1934 Securities Exchange Act.[77] The court refused to issue a stay in favor of a pending state court suit raising common law claims. The stay was sought because it did not appear the state complaint could be amended to include additional defendants in the federal suits and because the federal suit alleged violations of the 1934 Securities Exchange Act, the jurisdiction of which is exclusively vested in the federal courts.[78] This latter reason is particularly noteworthy in light of the elaborate efforts made by Judge Pell in *Aetna* to avoid this problem. In any case, it appears only this particular district court has had the opportunity to address itself to issues raised in *Aetna*.

Surprisingly, the United States District Court for the District of Columbia has also considered the propriety of court congestion and delay as a rationale for abstention. Since the District of Columbia does not have statehood status, it would seem abstention, with its overtones of federalism and comity, would not be a likely subject for discussion in a jurisdiction where both the federal and local courts are authorized by the same legislative body, the United States Congress. But in 1959, the District of Columbia District Court was faced with the abstention issue when a shareholder's derivative action filed in the district court was sought to be stayed pending the outcome of a parallel suit pending in a New York trial court.[79]

The district court felt a stay was proper. It pointed to a number of reasons: The same corporation was the actual beneficial plaintiff in both actions; the state court suit was brought first and was about to conclude; the named defendants in both suits were the same; and the transactions asserted and relief prayed for were the same in both actions. In making its decisions, the court considered

> not only the expense that would be caused to the parties involved by

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[75] 336 F. Supp. at 690, *citing* Aetna State Bank v. Altheimer, 430 F.2d 750, 755 (7th Cir. 1970).

[76] 336 F. Supp. at 691, *citing* Thompson v. Boyle, 417 F.2d 1041 (5th Cir. 1969).

[77] Abdin v. Goodbody & Co., 339 F. Supp. 1311 (E.D. Wis. 1972).

[78] *Id.* at 1313.

[79] Reiter v. Universal Marion Corp., 173 F. Supp. 13 (D.D.C.), *appeal dismissed as moot*, 273 F.2d 820 (D.C. Cir. 1959).

> an unnecessary trial but also the unnecessary consumption of the time of this Court which would be accorded to other litigants.[80]

Thus, federal courts in half of the circuits have dealt with the issue of whether a crowded docket is sufficient justification for the exercise of abstention. However, the courts have imposed varying requirements before they will abstain on these grounds. While all of these courts appear to require a pending state suit in which the party in the federal suit can litigate the important issues, some of the courts are more stringent in requiring that the issues and parties in both suits be identical. Other courts will exercise this discretionary power only in suits seeking equitable or declaratory relief.

II. Policy Considerations Relating to the "Fourth Abstention Doctrine"

Although certain requirements may have been imposed by the courts which have abstained on the grounds of judicial economy or convenience, it cannot be said these requirements reflect caution by the courts confronted with this issue. Despite the imposition of rigorous requirements, federal district courts that abstain on the grounds of judicial economy or convenience have made a major policy decision. In the absence of any clear guidance from the United States Supreme Court, federal trial courts have effectively denied plaintiffs access to a federal forum even though Congress has granted the federal courts jurisdiction to hear the causes of action.

Abstention based on one or more of the other three abstention doctrines identified by Wright[81] has been subjected to some criticism for abrogating the important policies of providing plaintiffs with a federal forum.[82] Countervailing policy considerations underlying abstention on these very grounds have been addressed by the Supreme Court. Principal among these policy considerations is comity, or the need to maintain a harmonious relationship between the state and federal judicial systems.[83] Wright, however, underscores the fact that the fourth abstention doctrine cases "go beyond anything required by the demands of federalism."[84] Yet, the cases invoking the fourth abstention doctrine pay

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[80] 173 F. Supp. at 15.

[81] *See* C. Wright, *supra* note 5, at 196.

[82] *See, e.g.*, Currie, *supra* note 6, at 316.

[83] *See, e.g.*, Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168 (1942), in which the Supreme Court emphasized that in considering the abstention question, courts must take into account the appropriate relationship between federal and state authorities functioning as a harmonious whole.

[84] C. Wright, *supra* note 5, at 205.

lipservice to these considerations.[85] What is often overlooked is that rather than paying deference to the interest of the state courts, federal abstention based on judicial economy or convenience usually pays deference to the interests of the federal courts.

On a policy level, therefore, abstention on the grounds of judicial economy or convenience can be justified only if one accepts the proposition that federal courts are empowered to exercise their discretion to effectuate a redistribution of the judicial power of the United States on the ground that they believe their dockets to be overcrowded. To date, neither the Supreme Court nor Congress has seen fit to address this crucial question. Thus, it appears policy decisions in this area will continue to be left to the lower federal courts.

III. Survey of Judges

In an effort to assess the attitudes of federal judges towards abstention and its related policy considerations, we mailed questionnaires to United States District Court judges in the fall of 1974.[86] The threshhold questions posed to the judges addressed the abstention question generally and attempted to determine: (1) the size and the trend (increase, decrease, or remain the same) in the volume of abstention cases in recent years; (2) the trend in their court's disposition of abstention cases; and (3) the degree of their satisfaction with the decisions of their courts in past abstention cases.

A significant majority of the federal trial court judges responding to the survey indicated that in recent years the number of cases in which they have had the opportunity to abstain has either increased or remained the same; 45.2 percent (75) of the responding judges answered that the volume had increased, and 22.9 percent (38) stated the volume had remained the same. Only 4.2 percent (7) of the federal district court judges indicated the number of abstention cases was decreasing.[87] Yet, the judges indicated, in terms of sheer numbers, the abstention case volume was still not very high. The majority of respondents—68.1 per-

[85] In the leading case of Mottolese v. Kaufman, 176 F.2d 301, 302 (2d Cir. 1949), the court explained that its discretionary power to stay the action was based on the need to give proper regard for the autonomy of the states.

[86] The federal judges in the territories and the District of Columbia Circuit were excluded from the survey for obvious reasons. Of the 370 remaining federal district court judges, 166 returned the questionnaire for a response rate of 44.9 percent. For comparison purposes, questionnaires were also mailed to the judges of the United States Courts of Appeal. For the most part, the responses of the federal appellate court judges were substantially similar to those of the federal trial court judges.

[87] Of the responding judges, 27.7 percent stated they were unable to determine a trend.

cent (113)—indicated their court was faced with only one to five such cases over the past 2 years,[88] but nearly 69 percent of the judges indicated they had abstained in one to five cases over that period.[89]

Although only 24.5 percent (40) of the responding judges indicated their court was willing to abstain in an increased number of cases in recent years, only 9.2 percent (15) were able to perceive a trend in the opposite direction.[90] Finally, 78.5 percent (128) of the judges indicated they were satisfied with the decisions of their court in past abstention cases. However, of the 21.5 percent (35) who stated they were dissatisfied with their court's past abstention decisions, 88.6 percent (31), or 19 percent of all those responding to the question, indicated their court had abstained too infrequently.

What emerges from the data is a rather surprising situation. Although almost half the judges responding to the questionnaire perceived an increase in the number of abstention cases in recent years, the number of abstention cases actually handled by these judges appears to represent a rather insignificant percentage of their total caseload. In addition, although the vast majority of respondents indicated they had exercised their discretionary power to abstain at least once in the past 2 years, only one quarter of the responding judges perceived a trend in the direction of an increased willingness on the part of their court to exercise this discretionary power. Finally, less than 20 percent of the responding judges indicated dissatisfaction with their court's handling of abstention cases for the reason that they abstained too infrequently. It appears rather unlikely, therefore, a federal trial court's decision to abstain could ever really have the salutary effect of easing the congestion of the federal docket even though the federal trial court judges do appear to exhibit a willingness to abstain whenever appropriate.

Our survey next attempted to ascertain those factors which were given the greatest weight in the judges' decisions to abstain. As expected, those factors which the United States Supreme Court has indicated could be of relevance to the abstention decision were accorded the greatest weight. For example, the following factors were considered suffient either to require abstention, standing alone, or be used to justify abstention when other factors favoring abstention are present: 96.2 percent—where "the probability of state questions will avoid the necessity

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[88] Of those responding, 21.1 percent stated that they were faced with more than five cases, while 10.8 percent indicated they were faced with no such cases.

[89] Only 6.1 percent responded that they had abstained in more than five cases, while 25.2 percent indicated they had not abstained at all during the past 2 years.

[90] Thirty-eight percent responded that their court had not changed the pattern of its exercise of abstention, while 28.2 percent responded that they were unable to determine a trend.

of deciding any federal questions involved";[91] 89.3 percent—"the presence of state issues that are difficult or of first impression";[92] 79.2 percent—"the presence of issues or circumstances which are of local character."[93]

When asked to state their opinion as to the importance they would attach to "the congestion and delay in the particular federal district or appellate court,"[94] the judges were much more cautious. Only 41.3 percent (66) were willing to state either that this factor standing alone required abstention, or that this factor could be used to justify abstention when other factors favoring abstention were present. What is even more revealing is that the overwhelming majority of the judges chose the latter alternative. Only 1.9 percent (3) of the responding judges were willing to go so far as to state that this factor, standing alone, required abstention.[95]

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[91] This is, essentially, the first of Wright's "abstention doctrines." *See* C. WRIGHT, *supra* note 5, at 196-99. It is usually referred to as the "Pullman doctrine," from the case of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

Of the judges responding, 46.5 percent (74) stated that, standing alone, this factor would require abstention; 49.7 percent (79) said this factor could be used to justify abstention when other factors favoring abstention are present; and the remaining 3.8 percent (6) stated that either this factor was irrelevant to the abstention doctrine or that it required the federal court decide the case.

[92] This is the third of Wright's "abstention doctrines." *See* C. WRIGHT, *supra* note 5, at 196. The leading case appears to be Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). Yet in Meredith v. City of Winter Haven, 320 U.S. 228 (1943), Chief Justice Stone stated:

> [T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be *do not in themselves* afford a sufficient ground for a federal court to decline to exercise its jurisdiction . . . .

Id. at 234 (emphasis added). This position was reaffirmed in McNeese v. Board of Educ., 373 U.S. 668 (1963).

Of the judges responding, 24.7 percent (39) stated that, standing alone, this factor would require abstention; 64.6 percent (102) said this factor could be used to justify abstention when other factors favoring abstention are present; and the remaining 10.8 percent (17) stated that either this factor was irrelevant to the abstention decision or required that the federal court decide the case.

[93] Essentially, the second of Wright's "abstention doctrines." *See* C. WRIGHT, *supra* note 5, at 196. The leading case in this regard is Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943).

Of the judges responding, 15.7 percent (25) stated that, standing alone, this factor would require abstention; 63.5 percent (101) stated that this factor could be used to justify abstention when other factors favoring abstention are present; and the remaining 20.8 percent (33) stated that either this factor was irrelevant to the abstention decision or required the federal court decide the case.

[94] Essentially, the fourth of Wright's "abstention doctrines." *See* C. WRIGHT, *supra* note 5, at 196.

[95] The majority, 58.8 percent (94), stated that either this factor was irrelevant to the abstention decision or required that the federal court decide the case.

In fact, attitudes towards these factors suggest the presence of congestion and delay in the federal court will be used to justify an abstention decision only in a relatively small proportion of the abstention cases handled by these judges. This observation, coupled with the survey's finding that the abstention cases, as a whole, generally seem to comprise a relatively small percentage of the total caseloads of these judges, prompts further speculation of how the decision to abstain for reasons of easing the congestion of the federal court docket could ever actually have a salutary effect.

Finally, the survey sought to examine the extent to which considerations of comity, or, more specifically, the desire to establish and maintain harmonious relations between the state and federal judicial systems, influence the federal judges' abstention decisions. Toward this end, the federal judges were asked two questions. First, they were asked how they thought state courts located geographically within the jurisdiction of their court viewed the abstention decisions made by federal courts. The second question attempted to determine whether federal judges were influenced in this regard by the attitudes of state judges. The majority of the responding federal judges—60.7 percent (88)—indicated they believed the state court judges felt the federal court judges abstained too *infrequently* and decided too many cases which should have been decided by the states.[96] Only 14.1 percent (23) of the responding federal judges, however, stated they were at all influenced by what they perceived to be the attitudes of the state court judges.[97]

Apparently, many federal judges do not appear to be particularly concerned with such comity considerations. Such an observation would tend to support Judge J. Skelly Wright's suggestion that "the 'autonomy' of the states may no longer rank among the primary values of our political and legal system."[98]

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[96] Only 3.4 percent (5) believed the state court judges feel the federal courts have abstained too often; 15.2 percent (22) believed the state court judges feel the federal court judges have made prudent and proper use of their power to abstain; and 20.7 percent (30) believed the state court judges are unconcerned about federal abstention.

[97] Among this number, considerations of comity appeared to be paramount. The response of one of the judges was fairly typical in this regard:

> I'm always concerned about the attitude of state judges for reasons of comity. What we do often enrages state judges and with good reason. We often get into situations which belong in state administration procedures or state courts.

However, a number of these judges indicated they had previously served on a state court bench and, thus, divulged a more personal concern. Another judge stated:

> I was for 18½ years a state trial judge—and maintain a good relation with my former fellow judges. Most of them are top-flight in ability. I respect their opinions.

[98] J.S. Wright, *The Federal Courts and the Nature and Quality of State Law*, in THE

Conclusion

Practically speaking the "fourth abstention doctrine" makes little sense. Even if the Supreme Court were to sanction abstention on the grounds of judicial economy or convenience, it appears unlikely the federal trial court judges will be predisposed to exercise their discretionary power to abstain on these grounds often enough to allow the doctrine to accomplish its stated purpose.[99]

Why, then, should we be concerned with the cases which sanction abstention on such grounds? The reason is that even though such cases do not threaten to comprise a significant percentage of the caseload of the individual federal trial court judge, they do threaten to become pervasive enough throughout the federal judicial system to have certain deleterious effects. Each year, numerous plaintiffs could be denied a federal forum simply because they happen to file their case in a court with a congested docket. What is worse is that few, if any, federal court plaintiffs could predict whether their case would be stayed or dismissed on these grounds.[100] Such uncertainty could prove to be disastrous for the federal judicial system.

Ultimately, the Supreme Court may be called upon to resolve this

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Future of Federalism (1968).

[99] The minimal impact of this type of discretion is evident when one makes the following observations and assumptions.

(a) In 1974, the Administrative Office of the United States Courts determined, using the "Weighted Filings" system it has devised, that there was an average of 350 "weighted case filings" per United States District Judge. Annual Report, *supra* note 4, at 316.

(b) The questionnaire responses indicated 78.9 percent of the federal district judges were presented with five or fewer cases during the past 2 years in which they could have abstained. Thus, a generous estimate would reflect that the average judge handled three "abstention cases" during the *past year*.

(c) To give these three cases a "weighted filing," the figure of 2.0 can be arbitrarily selected. This, too, is a generous weighting, because it has been estimated, for example, that the average stockholder's suit has a weight of 1.76 and the average condemnation case has a weight of 0.44. Federal Judicial Center, The 1969-70 Federal District Court Time Study 66c (1971). Therefore, if the average district judge has three "abstention cases" each year, and these have a "weighted filing" factor of 2.0, then only six of the judge's cases, or 1.7 percent, present situations where abstention may be appropriate. Of course, there is no way of discerning how many of these cases involve the so-called "fourth abstention doctrine," as opposed to the other three branches of the doctrine, but the attitudes of the judges toward the various rationales for abstention suggest it is not a significant number. See text accompanying notes 87 through 90 *supra*.

[100] Litigants would encounter less uncertainty if it were clear that the court could allow abstention on these grounds only if other requirements were met, such as the presence of a pending state action in which the issues and parties were similar. Of course, uncertainty from the litigant's point of view is only one of the difficulties inherent in the use of abstention; the fact that a court's decision to abstain can be predicted is irrelevant if its reasons for abstaining cannot be justified.

dilemma. It will be recalled that the Supreme Court unknowingly spawned this entire line of cases when it decided *Landis*. Unfortunately, many lower courts have since misapplied the *Landis* dicta set forth by Justice Cardozo. Although the Supreme Court has said in *Brillhart* that a federal district court may properly abstain in a *declaratory judgment* suit where another suit, involving the same issues and parties, is pending and is not governed by federal law, the Court's position beyond this is unknown. Various Justices have addressed the issue by means of dicta and concurring or dissenting opinions.[101] Most recently, the concern of Chief Justice Warren Burger about the crowded state of the federal court dockets, as reflected in his public statements and in his dissenting opinion in *Wisconsin v. Constantineau*,[102] heightens the probability the Supreme Court will be willing to deal with this issue in the near future.

It must be questioned, however, whether the Supreme Court is the appropriate body to answer this question. While the seriousness of the congestion and delay problem in the federal courts cannot be doubted, one must conduct a probing analysis of the judicial power of the United States to determine if judicial abstention is the proper means of remedying a caseload crisis. A starting point is Chief Justice John Marshall's pronouncement in *Cohens v. Virginia*:[103]

> The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline

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[101] For example, four Justices subscribed to the following argument in a dissenting opinion in County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959):

> [U]nder the peculiar facts of this case, the "exceptional circumstances" of which the majority speaks are present. An "order to the parties to repair to the state court would clearly serve an important countervailing interest," namely, the orderly and businesslike administration of justice, as well as the comity due Pennsylvania's courts.

Id. at 201.

Compare this with Justice Douglas' concurrence in England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). Justice Douglas specifically referred to *Beiersdorf* and *Mottolese* in commenting

> Some federal courts have used the doctrine to shuttle over to state court cases properly in the federal court yet not involving constitutional issues depending on the meaning of state law—decisions which baldly deny the suitor a remedy granted by Congress because it is not convenient to the district judge to decide the case.

Id. at 430 n.2 (citations omitted).

Also, see Chief Justice Burger's dissenting opinion in Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971).

[102] 400 U.S. 433, 439 (1971); *see* note 13 *supra*.

[103] 19 U.S. (6 Wheat.) 264 (1821).

> the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.[104]

Similarly, it must be remembered that access to the federal courts through diversity of citizenship jurisdiction is provided for not only in the Judicial Code,[105] but in article III of the Constitution itself.[106] While the Constitution does not require *Congress* to create diversity jurisdiction, there is nothing in the language of article III to indicate that, once granted, the *courts* have any discretionary power in the exercise of this jurisdictional grant.

Beyond this, the Supreme Court itself has conceded it is for Congress to vest the judicial power of the United States.[107] It would be difficult, then, to conclude the federal courts could divest themselves of this power simply for reasons of their own convenience.

Thus, Congress would appear to be the more appropriate body to deal with this dilemma. In its 6-year *Study of the Division of Jurisdiction between State and Federal Courts*, the American Law Institute recommended the "abstention doctrines" be codified in section 1371 of a new chapter 88 of the Judicial Code.[108] Subsection (c) defines the conditions under which abstention should ordinarily be ordered.[109] But

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[104] *Id.* at 404.

[105] 28 U.S.C. § 1332(a) (1970) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different states;
>
> (2) citizens of a State, and foreign states or citizens of subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

[106] U.S. CONST. art. III, § 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Counsuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the citizens thereof, and foreign States, Citizens or Subjects.

[107] *See* Lockerty v. Phillips, 319 U.S. 182 (1943); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

[108] ALI STUDY, *supra* note 2, at 48-50.

[109] Subsection (c) states:

> A district court may stay an action, otherwise properly commenced in or removed to a district court under this title, on the ground that the action presents issues of State law that ought to be determined in a State proceeding, if

the ALI recommendation fails to include the possibility of abstaining for reasons of judicial economy or convenience. Because subsection (f) bars abstention on grounds other than those provided in section 1371, federal trial court judges would no longer be able to invoke the fourth abstention doctrine if Congress were to adopt the ALI recommendations.

This structuring of the discretion of the federal trial judge is commendable in that it would eliminate the least justified of the "abstention doctrines." However, the ALI has not gone far enough. It has put into statutory form as much of the abstention doctrines as can be justified on the basis of comity and other legitimate considerations, but has failed to provide a means for eliminating the main flaws in the abstention scenario. The uncertainty, delay, forum-shuttling, and sheer waste of time and money currently existent will not be altered. Recognizing this, the ALI states there is "no wholly satisfactory answer."[110] We respectfully disagree.

For too long, it has been assumed that to accommodate the demands of federalism in the judicial area is to accept less than efficient judicial administration. Perhaps the problem has been that this accommodation has always fallen short of true cooperation. It is difficult, for example, to envision how the shifting of a burgeoning caseload from the federal to the state courts will *promote* comity and the interests of federalism. Alexander Hamilton wrote that "the national and State systems are to be regarded as ONE WHOLE."[111] Perhaps the time has come to take Hamilton's exhortation literally, if, in fact, the situation demands such a literal reading. Certainly, the abstention area would be a most appropriate place to begin.

To lessen substantially the uncertainty and delay and eliminate the forum-shuttling which is presently a part of abstention cases, we propose a mixed federal-state tribunal be established to handle abstention cases. Under such a system, the initial decision as to whether abstention is proper would be left to the discretion of the individual federal district

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> the court finds: (1) that issues of State law cannot be satisfactorily determined in the light of the State authorities; and (2) that abstention from the exercise of federal jurisdiction is warranted either by the likelihood that the necessity for deciding a substantial question of federal constitutional law may thereby be avoided, or by a serious danger of embarrassing the effectuation of State policies by a decision of State law at variance with the view that may be ultimately taken by the State court, or by other circumstances of a like character; and (3) that a plain, speedy, and efficient remedy may be had in the courts of such State; and (4) that the parties' claims of federal right, if any, including any issues of fact material thereto, can be adequately protected by review of the State court decision by the Supreme Court of the United States.

Id. at 49.

[110] *Id.* at 285.

[111] THE FEDERALIST No. 82 (C. Rossiter ed. 1961) (A. Hamilton).

court judge before whom the case has been brought. If the judge decides to abstain, however, he would certify this fact to the supreme court of the appropriate state. Then, under a scheme previously worked out within the state, two judges from the state's trial court of general jurisdiction would be designated to sit, together with the federal district court judge, as a three judge state-federal district court. Appeals from this court would be taken to the appropriate federal court of appeals.

The benefits which would derive from such a scheme are obvious. Once the initial abstention decision is made there would be certainty as to which forum would hear and finally decide the case (subject, of course, to the litigant's right to appeal the question as to whether abstention was proper). No longer would there be any possibility that the case would be shuttled back to the federal forum to decide remaining questions of federal law since the single forum would decide questions of both state and federal law. The delay and additional cost which necessarily accompany such forum-shuttling would be eliminated. Additional time may be conserved by virtue of the fact that one member of the three-judge tribunal—the federal judge—should already be well-acquainted with the case. Comity considerations should be satisfied by the majority of the members of the mixed tribunal being members of the state judiciary. On the other hand, the benefits to be gained in providing the litigants with a federal forum—such as federal discovery and due process protections—would be retained.

To be sure, there are many inherent problems with such a plan. First, objections might be advanced that the federal and state constitutions do not permit such an arrangement. We are unaware of any language in the federal constitution or the constitutions of the states, however, which would bar such a scheme.[112] Indeed, proponents of a "unified" judicial system (a joinder of federal and state judicial systems without the elimination of either) have stated their belief that this could be accomplished without amending the federal or state constitutions.[113]

The second principal set of objections probably would center on the impracticalities of such an arrangement. For example, given the conges-

[112] Some state court systems have already entered into a formalized relationship with locally situated federal courts through the establishment of a certification procedure. Under this arrangement, the federal courts may certify questions of state law to the state supreme court. The certification procedure has largely been put into effect by an enactment of the state legislature. One of the more popular statutory schemes is the "Uniform Certification of Questions of Law Act," which was drafted by the National Conference of Commissioners on Uniform State Laws in 1967 and approved by the American Bar Association in the same year. Other states have implemented a certification procedure by means of a court rule.

[113] *See, e.g.*, Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203, 1216 (1965).

tion in the federal and state judicial systems,[114] some might question taking up the time of three judges to handle a single case. But as we have demonstrated, abstention cases presently do not appear to constitute a significant proportion of the federal judicial workload and do not threaten to increase significantly in the future. They are irksome individually, but not in toto. What is more, each time a federal judge decides to abstain, at least two judges will be required, ultimately, to be involved in the case—the federal court judge who initially decides to abstain and who may later be called upon to decide unresolved federal issues, and the state court judge who is called upon to resolve the questions of state law. Indeed, by eliminating the forum-shuttling and wasteful duplication of effort, the scheme here proposed may actually result in a reduction in the total number of judicial man-hours required to bring the average abstention case to final resolution.

The advantages to such an arrangement should ultimately outweigh the disadvantages (both real and imagined). Although we have tended to emphasize the practical advantages, a major theoretical advantage must not be overlooked. Insofar as it requires joinder of the federal and state judicial systems to solve a particular problem, acceptance of this scheme could very well encourage Congress and the courts to reexamine, and ultimately redefine, the concept of federalism. By overuse (or misuse) of such terms as "comity" when dealing with interrelationships between the state and federal judicial systems, policymakers and commentators have tended to view these judicial systems as foreign to one another. However, as the United States Supreme Court has stated:

> [T]he courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.[115]

After nearly 200 years of wrestling with the concept of federalism in the judicial arena, the time is at hand for the federal and state judicial systems to consider common solutions to common problems. As "courts of the same country" nothing less should be expected.

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[114] *See, e.g.*, H. FRIENDLY, *supra* note 4; M. OSTHUS & R. SHAPIRO, CONGESTION & DELAY IN STATE APPELLATE COURTS (1974); SELECTED READINGS—COURT CONGESTION & DELAY (1971); Burger, *The State of the Judiciary*—1975, 61 A.B.A.J. 439 (1975).

[115] Chaflin v. Houseman, 93 U.S. 130, 137 (1876). More recently, the Supreme Court has described the concept of "Our Federalism" as

> a system in which there is sensitivity to the legitimate interests by both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971).

REALIGNMENT OF THE FIFTH CIRCUIT: A NECESSARY FIRST STEP

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Legislation which would create two independent divisions in what is now the Fifth Circuit is currently pending before the Congress.[1] Each of the divisions would be constituted as a court of record, and each would have its own chief judge. Effectively, this proposal would create a new judicial circuit. The bill commands impressive political support and does not appear to have developed the extensive and bitter opposition which frustrated prior attempts to create a new circuit from within the present Fifth.[2]

The pending legislation was introduced as a result of the recommendation of a Congressionally created commission, the Commission on Revision of the Federal Court Appellate System.[3] This marked the first

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[1] S. 729, 94th Cong., 2d Sess. (1975). The bill presently being considered by the Senate Judiciary Committee would create two independent divisions in the Fifth Circuit: an Eastern Division composed of Alabama, Florida, Georgia, Mississippi, and the Canal Zone; and a Western Division composed of Louisiana and Texas. Each independent division would have its own chief judge, its own judicial council, and its own circuit executive. Regarding the Fifth Circuit, the major difference between the recommendations of the Commission (see note 3) and this bill is that the chief judge who is senior in service is empowered to make interdivisional assignment without seeking the approval of the Chief Justice. In addition, the annual judicial conference "may be held jointly by the divisions."

[2] *See* Hruska, *The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 ARIZ. ST. L.J. 579, 585-88.

[3] The Commission was created pursuant to Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807, *as amended*, Act of Sept. 19, 1974, Pub. L. No. 93-420, §§ 6, 7, 88 Stat. 1153. The 1972 act is reproduced in 28 U.S.C. § 41 (Supp. III, 1973). For a detailed legislative history of the creation of the Commission, see Hruska, *supra* note 2.

The Commission in its first report recommended the creation of an additional circuit in the area of the present Fifth. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973) [hereinafter cited as GEOGRAPHICAL BOUNDARIES].

Thereafter, proposals were developed in the Congress for creating independent divisions. In testimony on S. 729, which embodied this proposal, Senator Roman L. Hruska stated that the members of the Commission had been "persuaded that S. 729 satisfactorily

time in the history of the federal government that Congress has sought the aid of a commission in the realignment process. The Commission, however, was not created to deal only with the boundaries of the several circuits; so limited a use would have been to employ, as Judge Friendly put it, "a steam roller to crack a nut."[4] Realignment was only the first, albeit an important, part of the Commission's assignment. The report on the geographical boundaries of the several circuits was filed at the end of 1973 and has been followed by a report of broader scope and sweep.[5] It is instructive at this juncture to consider briefly the nature of the Commission, the full extent of its mandate, and the interrelationship of its recommendations for circuit realignment with those which are contained in its most recent report.

The Commission on Revision of the Federal Court Appellate System was created in response to a felt need. For at least a decade prior to the act of Congress which authorized the Commission's creation, the courts of appeals had been a source of continuing concern. A floodtide of filings showed no promise of abating,[6] and responsible commentators referred to the "state of crisis"[7] in these courts.

The burgeoning caseloads did not fall evenly in each of the circuits, and there was a recognition of the need to provide immediate relief for those with the heaviest workloads. There was no disposition to ignore more complex problems of procedure and structure which would affect the system as a whole; on the contrary, there was widespread recognition of the need to deal with a broad range of problems besetting the "Fed-

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achieves the objectives sought by the Commission in its report on realignment and [they] state unequivocally that it is far preferable to doing nothing." Statement of Senator Roman L. Hruska, Chairman, on behalf of the Commission on Revision of the Federal Court Appellate System to the Subcommittee on Judicial Improvements of the U.S. Senate Committee on the Judiciary 1-2 (March 1975).

[4] *Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 63 (1971).

[5] See note 19 *infra*.

[6] In fiscal year 1960, a total of 3,899 appeals were filed in the 11 circuits; by 1972, the year preceding the creation of the Commission, the total more than tripled to 14,535; in the last complete fiscal year for which data is available, the total filings have grown to 16,435. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS 1974, at 13 (1974) [hereinafter cited as COURT MANAGEMENT STATISTICS].

[7] H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 31 (1973); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEXAS L. REV. 949, 976 (1964). *See* Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 KY. L.J. 807 (1972) ("The Federal Courts of Appeals are afflicted with an illness. While it is not malignant, there is a potential prognosis of chronic incapacity or partial paralysis."); Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 615 (1974) ("[T]he continuing health of the federal judicial system is in grave and immediate danger.").

eral courts of appeal system."[8] The response of the Congress was to provide for a commission to study and to make recommendations for change. The commission was to draw half of its membership from the Congress: four from the Senate[9] and four from the House.[10] In addition, there were to be four commissioners appointed by the President[11] and four by the Chief Justice.[12] All segments of the profession would thus be represented: the practicing bar, the academic community, the judiciary and, of course, the legislators who, ultimately, would bear major responsibility for implementation of whatever changes might be proposed.

This 16-member Commission was charged with two tasks, each with its own timetable. In the first instance, the Commission was

> to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business.[13]

Taking note of the urgency of the need for relief, Congress provided that the Commission was to file this first report within 180 days of the appointment of its ninth member.[14]

More, of course, was required than a report on realignment, and Congress directed that the Commission in the second phase of its work

> study the structure and internal procedures of the Federal courts of appeal system, and . . . report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent always with fundamental concepts of fairness and due process.[15]

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[8] This is the language of the statute. Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(b), 86 Stat. 807, *quoted in* GEOGRAPHICAL BOUNDARIES, *supra* note 3, at 5.

[9] The four appointed from the Senate who served through the filing of the first report were: Senator Quentin N. Burdick (D.-N.D.), Senator Edward J. Gurney (R.-Fla.), Senator Roman L. Hruska (R.-Neb.), and Senator John L. McClellan (D.-Ark.). In Jan. 1974, Senator Hiram L. Fong (R.-Hawaii) replaced Senator Gurney.

[10] The four appointed from the House are: Congressman Jack Brooks (D.-Tex.), Congressman Walter Flowers (D.-Ala.), Congressman Edward Hutchinson (R.-Mich.), and Congressman Charles E. Wiggins (R.-Cal.).

[11] The four appointed by the President are: Honorable Emanuel Celler, former Chairman of the House Judiciary Committee (D.-N.Y.), Dean Roger C. Cramton of the Cornell Law School, Francis R. Kirkham, Esq., of the San Francisco Bar, and Judge Alfred T. Sulmonetti of the Circuit Court of Oregon.

[12] The four appointed by the Chief Justice are: Judge J. Edward Lumbard of the Court of Appeals for the Second Circuit, Judge Roger Robb of the Court of Appeals for the District of Columbia Circuit, Bernard G. Segal, Esq., of the Philadelphia Bar, and Professor Herbert Wechsler of the Columbia University School of Law.

[13] Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(a), 86 Stat. 807.

[14] *Id.* § 6(1), 86 Stat. 808.

[15] *Id.* § 1(b), 86 Stat. 807.

Under the statute as amended, this report was due within 24 months of the appointment of the Commission's ninth member.[16]

Pursuant to its mandate, the Commission has submitted two reports. The first, filed in December 1973, recommended the creation of two additional circuits in the areas which presently constitute the Fifth and Ninth Circuits.[17] Noting that work had already begun on the second phase of the Commission's assignment, the report emphasized that

> whatever may emerge from that effort or from changes by the Congress or by the courts themselves which can now be envisioned, litigants in the Fifth and Ninth Circuits are entitled to that immediate and significant relief which our proposals would provide.[18]

More recently the Commission completed the second phase of its study, and on June 20, 1975, it filed a second report, *Structure and Internal Procedures: Recommendations for Change.*[19] In this report, the Commission "adhere[d] without reservation to its previous report calling for immediate relief to the Fifth and Ninth Circuits by way of creating new circuits or, as indicated in its later statement, independent divisions."[20]

To consider the relationship between the recommendations of the two reports it is necessary first to analyze the reasoning which impelled the Commission to conclude that circuit realignment was a "necessary first step."[21] We begin with a description of the conditions which circuit realignment was intended to alleviate, focusing on the Fifth Circuit.[22]

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[16] Act of Sept. 19, 1974, Pub. L. No. 93-420, 88 Stat. 1153, *amending* Act of Oct. 13, 1972, Pub. L. No. 92-489, § 6(2), 86 Stat. 808.

[17] GEOGRAPHICAL BOUNDARIES, *supra* note 3, at 8, 13.

[18] *Id.* at 5.

[19] COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as STRUCTURE AND INTERNAL PROCEDURES].

[20] *Id.* at 59. The "later statement" referred to in the text is that of Senator Roman L. Hruska, Chairman, on behalf of the Commission on Revision of the Federal Court Appellate System to the Subcommittee on Judicial Improvements of the Senate Committee on the Judiciary (March 1975), *quoted in* note 3 *supra*.

[21] GEOGRAPHICAL BOUNDARIES, *supra* note 3, at 4.

> [R]ealignment is a necessary first step in the Fifth and Ninth Circuits, not only to afford relief to the pressing problems of the present, but also to provide a firm base on which to build more enduring reforms.

[22] The Fifth Circuit was the first to have more than nine active judges, it has the largest complement of active judges of the circuits, and it has the largest caseload of any circuit. Thus, it has the most experience with the problems of the large circuit.

Our decision to focus on the Fifth Circuit is not to be read as minimizing the need for realignment of the Ninth Circuit. See note 30 *infra*.

I. "Jumboism" in the Fifth Circuit

With 3,294 appeals filed in fiscal year 1974, the Fifth Circuit has the largest volume of any of the courts of appeals—over one-fifth of the total filings of the 11 circuits.[23] Moreover, despite its 15 authorized judgeships, it has the highest caseload per judgeship of any of the circuits—220 appeals filed per judgeship in fiscal year 1974, 30 percent more than the national average.[24]

Caseload alone is not the full dimension of the problem. The Fifth Circuit is geographically huge, stretching from the Florida Keys to the New Mexico border. It covers six states—Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas— and the Canal Zone. "Jumboism," the majority of the active judges of the circuit wrote to the Commission, "has no place in the Federal Court Appellate System," emphasizing that the statement was intended to apply to geographical area as well as to the number of judges serving the court.[25] The concern of the judges is understandable. The need to travel results in loss of time and in the kind of inconvenience which, at least for some, affects productivity. The loss to practitioners, with a resultant increase in cost to the client, is no less significant.[26]

There can be little doubt that geographical considerations were an important factor in the decision of the judges of the Fifth Circuit to dispose of more than half their cases without oral argument[27] and with-

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[23] Court Management Statistics, *supra* note 6, at 5, 13. The statistics cited in this article focus on raw filings, rather than terminations. It has been suggested that terminations after hearing or submission is a more accurate reflection of judicial workload because many appeals "wash out" without judicial intervention. Such use, however, is not free of difficulties. First, cases categorized as terminated without hearing or submission include some decided with a per curiam or memorandum opinion; clearly, these have required judicial attention. Second, these figures include cases consolidated for hearing or submission, which often may require more judicial time and effort than a simple two-party case. For a more extended discussion of the problems of measuring judicial workload, see Structure and Internal Procedures, *supra* note 19, Appendix C, at A-169-71.

[24] Court Management Statistics, *supra* note 6, at 5, 13.

[25] *1973 Hearings Before the Commission on Revision of the Federal Court Appellate System* 394 (1975) [hereinafter cited as *Commission Hearings*]. After the sentence quoted in the text, the judges added: "This statement applied both to *geographical area* and the *number of judges* serving the court." (emphasis in original) This joint statement was submitted to the Commission by Hon. Griffin B. Bell, Hon. Charles Clark, Hon. James P. Coleman, Hon. David W. Dyer, Hon. Walter P. Gewin, Hon. John C. Godbold, Hon. Lewis R. Morgan, and Hon. Bryan Simpson.

[26] See *id.* at 448 (testimony of James McLean, Esq., President, Jacksonville Bar Association), 632 (exhibit submitted by Hon. John R. Brown).

[27] In fiscal year 1974, oral argument was denied in 54.9 percent of the disposed cases. This represents a decline from fiscal year 1972, when oral argument was denied in 59.1 percent of the disposed cases. Clerk's Annual Report, Fifth Circuit, Fiscal Year 1974, at 12 (1974).

out the judges on the panel meeting together for a conference in which views are exchanged.[28] The resultant savings in travel is not to be minimized and is in no small measure responsible for the fact that, until recently, the Fifth Circuit was able to remain current in its work. But these changes in procedure exact a price of their own, as will be discussed more fully below.[29] If the trend is to be reversed, and if the right to oral argument is to be restored in any significant number of cases, then the adverse impact of geography must inevitably become more significant.[30]

II. Accommodating Mounting Caseloads

No matter how compact a circuit, how small the geographic area which it encompasses, the crucial variable in the efficient and effective operation of the court must be its caseload. If caseloads are small, there is time for travel; time to hear oral argument; time to write, revise, and refine opinions; and, perhaps most importantly, time for the contemplation and study necessary to maintain that high level of performance which our society has come to expect from the federal judiciary.[31] If caseloads maintain a pattern of steady increase, there will come a point at which old patterns must yield, and change will become the only alternative to backlogs, delay, and, ultimately, a breakdown in the system. When this point is reached there are only a limited number of alternatives available. Basically, change can come in one of three ways:[32] (1) Steps can be taken drastically to reduce the input; jurisdiction of the court, for example, can be limited; (2) judicial productivity can be dramatically increased; traditional processes can be curtailed or eliminated, for example, by deciding hundreds of cases without oral argument, without a face-to-face conference of the judges, and without opinion; or (3) more judges can be made available for the disposition of judicial business, typically by creating new judgeships and thus increasing the size of the court. We shall examine each of these alternatives in turn.

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[28] *Commission Hearings, supra* note 25, at 416 (testimony of Hon. Charles Clark). Of course, the judges do confer extensively by telephone. *Id.* (testimony of Hon. Walter P. Gewin).

[29] See text accompanying notes 50 through 64 *infra.*

[30] The Ninth Circuit covers a geographical area even larger than the Fifth, extending from the Arctic Circle to the Mexican border, and including Idaho and Montana as well as Hawaii and Guam. The Ninth Circuit also has a large caseload, with more filings than any other circuit but the Fifth—2,697 in fiscal year 1974. Court Management Statistics, *supra* note 6, at 12. Litigants in the circuit have experienced delays of 2 years or more on the appellate level alone. As of July 30, 1974, there were pending in that court 2,355 appeals, or 181 per judgeship. *Id.*

[31] *See Commission Hearings, supra* note 25, at 396 (joint statement).

[32] *See* Wright, *supra* note 7, at 958.

A. *"Lessening the Flow"*

The business of the courts of appeals is, in large measure, a reflection of cases decided by the district courts;[33] a drastic reduction in filings at the trial court level would be reflected in fewer cases before the appellate courts. In theory, at least, relief would be dramatic. "Averting the flood by lessening the flow,"[34] is Judge Henry Friendly's striking metaphor, one which describes a goal worthy of support.

Reform of the law governing the basic jurisdiction of the district courts is long overdue.[35] Diversity jurisdiction in particular has been the subject of sustained attack. As Chief Justice Burger recently wrote, "in the 20th century such cases have no more place in the federal courts than the trial of a contested overtime parking ticket!"[36] Precisely because there is such widespread agreement among scholars and judges that diversity jurisdiction should be sharply curtailed if not eliminated,[37] it is instructive to examine carefully the proposal in the present context. Witness after witness, in testimony before the Commission, pointed to a radical revision of diversity jurisdiction as not only desirable in itself, but also as an alternative which would alleviate the need for circuit realignment and for a National Court of Appeals.[38] We concur

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[33] There are, of course, other sources of judicial business for the courts of appeals. In fiscal year 1974, for example, 2,205 of the 16,436 cases in the courts of appeals came from administrative boards and commissions. However, the bulk of the work (13,812 cases) came from the district courts. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATION OF THE U.S. COURTS, Table B3 (1974).

On the significance of changing rates of appeal as a variable, see Goldman, *Federal District Courts and the Appellate Crisis*, 57 JUDICATURE 211, 212-13 (1973).

[34] Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

[35] H. FRIENDLY, *supra* note 7, at 4, *quoting* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 541 (1954):

> In a paper given at a Conference on Federalism held [at Columbia University] on the occasion of its bicentennial in 1954, . . . Professor Henry M. Hart, Jr., of the Harvard Law School . . . said that "[t]he time has long been overdue for a full-dress re-examination by the Congress of the use to which these [federal] courts are being put." It is now overdue by nearly twenty years more.

[36] Letter from Chief Justice Warren E. Burger to Senator Roman L. Hruska, May 29, 1975, at 6, in STRUCTURE AND INTERNAL PROCEDURES, *supra* note 19, at A-177.

[37] *See, e.g.*, AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969); H. FRIENDLY, *supra* note 7, at 139-52. This theme was sounded repeatedly throughout the course of the Commission's hearings. *See, e.g.*, note 38 *infra*. *But see* Moore & Weckstein, *Diversity Jurisdiction: Past, Present, and Future*, 43 TEXAS L. REV. 1 (1964). For a review of opinions in the area, see H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1058 (2d ed. 1973).

[38] *See, e.g., Commission Hearings, supra* note 25, at 363 (statement of Hon. John Minor Wisdom); statement of Hon. Ruggero J. Aldisert to the Commission on Revision of the Federal Court Appellate System, at 2-6, April 15, 1975 (statement joined by Hon. Francis L. Van Dusen, Hon. John L. Gibbons, Hon. Max Rosenn, Hon. James Hunter III, Hon. Joseph F. Weis, Jr., and Hon. Leonard I. Garth).

that remedial legislation curtailing or eliminating diversity jurisdiction is highly desirable. It would be wrong, however, to fail to recognize the limited relief afforded appellate courts by pending proposals, or even by banishing these cases from the federal system altogether.[39] For significant relief to be afforded the courts of appeals, far more than diversity cases would have to be diverted from the federal system.[40]

There is, however, a more basic flaw in placing excessive reliance on "lessening the flow." The Congress, in authorizing creation of the Commission on Revision of the Federal Court Appellate System, was explicit in providing that the Commission should neither study nor recommend changes in the jurisdiction of the district courts.[41] It was not that Congress failed to recognize the relation between the business of the trial courts and that of the appellate courts; on the contrary, the need to specify that district court jurisdiction was not to be within the competence of the Commission arose precisely because the members of the conference committee who fashioned the final version of the bill recognized that any study of appellate structure and procedures "must necessarily take into consideration the types of cases which enter the judicial system at the district court level."[42] The source of the difficulty is rather a practical one. Legislation curtailing diversity jurisdiction has been pending for years, unable to muster sufficient support to be enacted into law.[43] If this is true with respect to diversity jurisdiction, where the case for change has been thoroughly documented, one should not be sanguine about the prospects of more radical and more controversial proposals for

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[39] Diversity jurisdiction comprised only 9.29 percent of the caseload of the courts of appeals in fiscal year 1974. This may be contrasted with fiscal year 1965 when 14.04 percent of the total filings were diversity cases. While filings increased about 143 percent from 1965 to 1974, the number of diversity cases in the courts of appeals has increased only 61 percent. *See* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Tables B1 (1974), B7 (1965).

In the Fifth Circuit diversity cases now constitute only 11.9 percent of the caseload, although only 9 years ago they constituted 16.8 percent of the total docket. *Id.* Diversity cases do, however, constitute a greater percentage of the district court caseload. *Id.* Table C2 (1974).

[40] For example, Judge Henry Friendly recommended that Federal Employers' Liability Act cases and marine personal injury cases be removed from the federal courts. H. FRIENDLY, *supra* note 7, at 129-33.

[41] Conference Report to accompany H.R. 7378, H.R. REP. No. 292-457, 92d Cong., 2d Sess. 5 (1972).

[42] *Id.*

[43] Bills which would abolish or sharply curtail diversity jurisdiction have been the subject of political controversy since the 1930's when the Senate Judiciary Committee twice reported such bills. *See* S. REP. No. 530, 72d Cong., 1st Sess. (1932); S. REP. No. 691, 71st Cong., 1st Sess. (1932). Similar legislation has been repeatedly introduced in the intervening years, most recently in the 93d Congress. S. 1876, 93d Cong., 1st Sess. (1973). H. HART & H. WECHSLER, *supra* note 37, at 1053-59.

reducing federal jurisdiction.[44] Moreover, the federal courts do not live in a static world. Filings have been increasing at a dramatic pace, and we cannot realistically rely on a reversal of the trend. As a result, the net effect of pending legislation is likely to be no more than the slowing or stopping of the rate of growth.

Political considerations aside, it is important to recognize that the volume of cases in the federal judicial system should not be viewed, in and of itself, as an ultimate end or a determinative criterion. Our society relies heavily on the federal courts and has an interest in assuring that these courts continue to meet its needs. It would be intolerable if the judicial system were rendered incapable of meeting additional demands, if ideas sound on their merits had to be rejected solely for lack of capacity in the system.

In short, significant change in the jurisdiction of the district courts is clearly needed and deserving of endorsement and support.[45] It should not, however, be viewed as an alternative adequate to obviate the need for circuit realignment.

B. Increasing Judicial Productivity

Increased judicial productivity must always be considered as a possible solution to the problems of mounting caseloads. It offers obvious attractions: added cost, at least in terms of money, is low, if it is a factor

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[44] See note 40 *supra.*

[45] Yet another method of reducing the caseload of the courts of appeals deserves consideration. Instead of excluding cases from the federal judicial system, it is possible to siphon off various categories of appeals from the regional courts to specialized tribunals. Thus, for example, there have been serious proposals for the creation of a Court of Tax Appeals, for centralizing appellate review of all patent cases in the Court of Customs and Patent Appeals, for the creation of a new tribunal to dispose of some or all classes of cases decided initially by the various administrative agencies. An extensive literature on the subject has developed over the past quarter century and shows no signs of abating. *E.g.*, H. FRIENDLY, *supra* note 7, at 153-71.

The Commission has rejected this approach. It "concluded that, on balance, specialized courts would not be a desirable solution either to the problems of the national law or . . . to the problems of regional court caseloads." STRUCTURE AND INTERNAL PROCEDURES, *supra* note 19, at 28.

In considering the problems of accommodating mounting caseloads, the members of the Commission considered it especially significant that

> [i]f the Commission were to recommend, and the Congress to approve a Court of Administrative Appeals or a Court of Tax Appeals for relief of the regional courts of appeals, cases from all over the country would be diverted there immediately, including cases from the three-judge First Circuit as well as from the Second, Fifth and Ninth, regardless of the relative needs or capacities of those several courts.

Id. at 56.

at all;[46] change is usually within the competence of the court itself, offering the possibility of rapid implementation, easy monitoring, and continuing flexibility; finally, change is readily tailored to the specific needs of a given court and to the conditions which obtain in a specific circuit.

Eleven years ago, Professor Charles Alan Wright wrote that the Fifth Circuit "is now doing as much as it can do—and perhaps more than it should do."[47] He did not think that there was "a panacea in sight which [would] enable any increase in the maximum figure of 80 cases disposed of per judge . . . ."[48] Viewed in the perspective of that time, the judgment was certainly justified. However, under the leadership of Chief Judge John R. Brown, and the pressure of mounting caseloads, the increases in judicial productivity of the Fifth Circuit in the intervening years have been little short of spectacular.[49] The judges of the Fifth Circuit have been hard working and imaginative in meeting the demands of their heavy caseload. Their innovations include the screening of cases for oral argument and the increased use of alternatives to the traditional signed opinion.

There is, however, a limit on the extent to which procedural innovations can be used to accommodate mounting caseloads; when that limit is reached, and there are indications that the limit has been exceeded in the Fifth Circuit,[50] it would be wrong to expect more from this ap-

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[46] One of the methods of improving judicial efficiency, which involves some increased expense, is the use of a central staff. Although aware of the risks of undue delegation of judicial authority inherent in the use of such staffs, the Commission has recommended the "development and optimal utilization of central staffs by the courts of appeals," confident there is a gain to be realized. STRUCTURE AND INTERNAL PROCEDURES, *supra* note 19, at 54. *See generally* D. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974).

[47] Wright, *supra* note 7, at 962. In this article, Professor Wright rejected circuit realignment as the solution for the problems of the Fifth Circuit in the mid-sixties. He felt at that time it would be preferable to create additional judgeships for the Fifth Circuit, which then had only nine authorized judgeships, and to experiment with a court of fifteen:

> [I]t will be possible to see what happens when a court of appeals has more than fifteen judges. If such a court is too unwieldy, if it shows inefficiency or disunity, then it will be time enough to create the Eleventh Circuit.

Id. at 978. Wright's suggestion was adopted. Of course, even the additional judgeships were not sufficient to meet the demands of the Fifth Circuit's caseload without a great increase in judicial productivity. See note 49 *infra*.

[48] Wright, *supra* note 7, at 962.

[49] By fiscal year 1974, terminations per judgeship had increased to 181. COURT MANAGEMENT STATISTICS, *supra* note 6, at 5. While the contribution of senior and visiting judges should not be underestimated, this dramatic increase in productivity is due in largest measure to the innovations in procedure of the judges of the Fifth Circuit. See text accompanying notes 51 & 52 *infra*.

[50] This view was expressed in a written statement submitted by the State Bar of Georgia to the Commission:

proach. Nothing less than the integrity of the judicial process is at stake.

The Fifth Circuit has been able to avoid intolerable delay on the appellate level only through the institutionalization of a series of summary procedures. These "screening and summary procedures," as one witness before the Commission put it, "have been necessary. They have been essential. But they do not . . . result in the quality of justice to which the litigants of this circuit had become accustomed . . . ."[51] The same witness stated:

> [I]t is perfectly obvious that, but for the innovativeness and dedication of the present judges, the court would have drowned in a sea of litigants' unreachable appeals. "Screening" and severe curtailment of oral argument have been the lifesaving measures devised and implemented just to permit the survival of the court as a functioning institution, dealing in the business of judging.
>
> But, like most other things, while screening and summary dispositions have their advantages . . . they also have some very grave and fundamental disadvantages—so grave that other means must be found and implemented so that the quality of justice is not "screened" out in order that the quantity of justice can be increased.[52]

The summary procedures of the Fifth Circuit have involved both the denial and curtailment of oral argument and reduced opinion writing.[53] The denial of oral argument in so large a percentage of the court's docket—54.9 percent of the cases during fiscal year 1974—has drawn heavy criticism from both the bench and bar.[54] As one lawyer put it at the Commission's hearings,

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> The court has done an excellent job in endeavoring to deal with the excessive volume of work now placed upon it. In its valiant effort to accomplish this, however, it has had to resort to procedures under which many of its cases are disposed of without argument or with very limited argument and under which many cases are disposed of by order-type opinions. These procedures, while no doubt useful when applied with careful restraint, have had to be utilized to an extent which has created a considerable measure of concern and dissatisfaction among the lawyers practicing before the court.

Commission Hearings, *supra* note 25, at 660 (statement of the State Bar of Georgia).

[51] *Id.* at 319-20 (statement of Samuel Gainsburgh, Esq.).

[52] *Id.* at 316.

[53] CLERK'S ANNUAL REPORT, *supra* note 27, at 12. Only 7.6 percent of the cases received the full 30 minutes of oral argument per side recognized as the norm by rule 34(b) of the Federal Rules of Appellate Procedure.

[54] A survey of lawyers of the Fifth Circuit, conducted by the Bureau for Social Science Research, commissioned by the Federal Judicial Center, reported only 40 percent of the lawyers surveyed considered avoiding extreme delay an acceptable reason for denial of oral argument. Nevertheless, 84 percent of those same attorneys believe there are situations when the denial of oral argument would be acceptable, for example, when the appeal borders on frivolity as determined by the court (89 percent) or when the issues are clear

> The fact that oral argument is denied across the whole spectrum of the court's docket in such a large percentage of cases . . . suggests that the expediencies of keeping up with the constantly increasing volume of the court's business has been at the expense of one of the historic elements of advocacy and due process—oral argument. I for one challenge seriously that this is in the best interests of the administration of justice.[55]

Chief Judge John Brown has explained:

> [I]t is a colossal error to think that the . . . cases disposed of without oral argument are all frivolous, worthless, shallow appeals. Many are substantial, serious, oftentimes difficult questions but as to which the panel unanimously determines that oral argument would not be helpful.[56]

Particularly in these "cases where there are substantial questions," the lawyer would like the

> opportunity to answer questions that are on the minds of the judges, to direct argument to difficult and perhaps unclear areas that he hasn't known about, and perhaps this is the only opportunity he has for a face-to-face dialogue and confrontation with the judges who are going to decide these cases . . . .[57]

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and can be decided by reference to precedent (72 percent). Moreover, 52 percent of these Fifth Circuit attorneys felt that "when a litigant is denied the right to have his lawyer argue his appeal, the litigant will feel that he has not had his day in court." T. DRURY, L. GOODMAN & W. STEVENSON, ATTORNEY ATTITUDES TOWARD LIMITATION OF ORAL ARGUMENT AND WRITTEN OPINION IN THREE U.S. COURTS OF APPEALS 19, 20, 38 (1974) [hereinafter cited as ATTORNEY ATTITUDES].

[55] *Commission Hearings, supra* note 25, at 332 (statement of Cicero Sessions, Esq.). To similar effect is the statement of Judge Griffin Bell that oral argument is being denied in about 10 percent too many cases. *Id.* at 486.

[56] *Id.* at 511 (statement of Hon. John R. Brown).

[57] *Id.* at 376 (testimony of M. Roland Nachman, Esq., then President of the Alabama Bar Association). Similar thoughts were expressed by Samuel C. Gainsburgh, Esq., when he testified before the Commission:

> I think that the lawyers, trial advocates, if I may presume to use that word, are accustomed to being able to appear and explain and to answer questions, and to feel that after they do this, even if they haven't been such good readers, that it adds another dimension to the affairs of the client.
>
> And I think they are resentful of the fact that the screening and summary procedures, they feel, deprives their profession of one dimension which is the opportunity to discourse with the court, and to argue and discuss with the court, or share ideas, or whatever you choose to call it; and also the knowledge that after having done so, the members, the deciding members of that court, the three judges who have that case, who have heard the argument, are going to sit down in the room somewhere and eyeball one another, and look at each other, and talk about their client's case.
>
> I think that is why the lawyers are uneasy about the screening procedures.

Id. at 323.

At the same time that the judges were denying oral argument, they were reducing the number of cases in which they issued signed opinions. Per curiams became a frequent alternative, and in addition, the court promulgated local rule 21[58] which provided, in appropriate cases, for a "form opinion" which, in effect, was no opinion at all. The net effect was to run the risk of eroding the confidence of the litigants that at least one judge had considered his case.[59] During fiscal year 1974, 34.8 percent of the Fifth Circuit's cases[60] were decided with only a rule 21 opinion and this too drew criticism from the members of the bar:

> I am unconcerned how the Fifth Circuit Local Rule 21 is explained, evaluated, parsed or justified. It boils down in any event to the proposition that 40 percent of its civil appeals shouldn't have been taken because they are either frivolous or unworthy of full appellate consideration and are to receive summary disposal. I simply am not persuaded

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The survey described above reports that 94 percent of the Fifth Circuit lawyers surveyed agreed that "[o]ral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case," and 90 percent agreed that "[b]y asking questions of counsel, the judges are better able to avoid erroneous interpretations of the facts or issues in the case." ATTORNEY ATTITUDES, *supra* note 54, at 38 (Table 26).

[58] The Fifth Circuit's rule 21 provides:

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.
>
> In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

[59] The survey of Fifth Circuit attorneys described above shows that 76 percent of the respondents agreed that "[i]ssuance of a reasoned disposition assures the litigants that the attention of at least one judge was given to the case." ATTORNEY ATTITUDES, *supra* note 54, at 45 (Table 27).

It is interesting that 70 percent of the lawyers who responded to the survey in the Fifth Circuit agreed with the statement that "[t]he due process clause of the Constitution should be held to require courts of appeals to write at least a brief statement of the reasons for their decisions." *Id.* at 43 (Table 28).

[60] CLERK'S ANNUAL REPORT, *supra* note 27, at 7. In addition, 31.3 percent of the cases were decided with per curiam opinions, while only 33.8 percent of the cases were decided with signed opinions. *Id.*

It should be noted that 41.3 percent of the cases which were decided without oral argument also received a rule 21 opinion. *Id.* at 8. That is, 23 percent of the cases were decided with a rule 21 opinion after the denial of oral argument.

It should be noted that some rule 21 opinions include citation to relevant governing authority.

> the Rule 21 procedures can possibly be legitimated for the astoundingly large total of 40 percent of the court's civil docket.[61]

The members of the Commission were persuaded of the value of oral argument in all but limited categories of cases. They concluded that a national minimum standard governing the right to be heard on appeal is appropriate.[62] This would serve to increase the percentage of cases afforded oral argument in the Fifth Circuit. The Commission has also recommended "that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief and whatever the form, of the reasoning which impelled the decision."[63] Chief Judge Brown has testified before the Commission about the extent to which the Fifth Circuit would be backlogged in its caseload were it not for its summary procedures.[64] By recommending a return to more traditional

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[61] *Commission Hearings, supra* note 25, at 331 (statement of Cicero Sessions, Esq.).

[62] The Commission has recommended the following minimum national standard as appropriate for inclusion in the Federal Rules of Appellate Procedure:

> (1) In any appeal in a civil or criminal case, the appellant should be entitled as a matter of right to present oral argument, unless:
>
> (a) the appeal is frivolous;
>
> (b) the dispositive issue or set of issues has been recently authoritatively decided; or
>
> (c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.
>
> (2) Oral argument is appropriately shortened in cases in which the dispositive points can be adequately presented in less than the usual time allowable.

STRUCTURE AND INTERNAL PROCEDURES, *supra* note 19, at 48.

[63] *Id.* at 50.

[64] Chief Judge John Brown explained that had oral argument been granted in all of the cases in fiscal year 1973, "It would have taken 19 weeks of sittings for each of our fifteen judges." He continued:

> Now, if you could sit ten weeks, it would take 132 visiting judges, and you couldn't get that. . . . If 30 visiting judges could be obtained, we would have a backlog of 680, and if not getting those, a backlog of 880.
>
> Now, the significance of that is that any backlog is automatically carried forward into the next year, at which time, . . . the projected filings are already increased. . . . [Y]ou would have to sit 22 weeks, you would have to have 186 visiting judges. It is just absurd to think about it. And if you had no outside help, you would have a new cumulative backlog of 1240, and so on ad infinitum.

Commission Hearings, supra note 25, at 148-49 (testimony of Hon. John R. Brown).

These figures are updated in the Fifth Circuit Clerk's 1974 Annual Report:

> Without screening a total of 1,874 cases would have had to be calendared this past year for oral argument. This would have required 53 additional weeks of court besides the 41 actually held this year for a total of 94 weeks of court at 20 cases per week. For the Active Judges of the Fifth Circuit to hear oral arguments in 1,874 cases, each Active Judge would have had to sit 19 weeks (about every third calendar week of the year) instead of the seven weeks each produced by the screening procedure (Class III and IV).

procedures, the Commission has implicitly recognized that more judges will be needed in all circuits—certainly in the Fifth if an unconscionable delay in dispensing justice is to be avoided.

C. Creating Additional Judgeships: Problems of Managing a Large Circuit

In recent years the creation of still more judgeships has not been viewed as a desirable solution for the problems of the Fifth Circuit. The active judges of the circuit, acting unanimously, have repeatedly rejected additional judgeships as a remedy: an increase beyond 15 would, in their words, "diminish the quality of justice" and the effectiveness of the court as an institution.[65] Indeed, a majority of the active judges of the circuit, in their joint statement to the Commission, asserted that even 15 is too large a number of judges for maximum efficiency.[66]

The experience of the judges of the Fifth Circuit illumines the problems of the large circuit. These problems arise primarily in three areas: the collegiality of the court, the proliferation of intracircuit conflicts, and the administration of the en banc court.

One of the judges of the Fifth Circuit has described the collegiality problem succinctly:

> A court that is too large loses the essential sense of collegiality. Like any other group, as it grows larger it tends to fragment into subgroups. [The Fifth Circuit judges] have not fragmented, in fact we have carefully avoided it, but there is no guarantee that our efforts will always be successful.[67]

Judge Irving Goldberg has further elaborated on this point:

> As a member of the Court of Appeals for the Fifth Circuit since 1966, I will stand on the proposition that a Court of Appeals composed of 15 judges, residing in six states and 12 cities, cannot be effectively administered without many burdensome control mechanisms. We have forms to the right of us, forms to the left of us, and always in front of us. Moreover, the mammoth size of the court and the concomitant bureaucratic maze interfere with what I consider one of the prime requisites of the ideal operation of a Court of Appeals—collegiality. The electronic inventions of our time are not sufficient to penetrate the mountains of processed pulp wood and reach an overly large number of judges separated by vast distances. Thus, the face-to-face contact and

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CLERK'S ANNUAL REPORT, *supra* note 27, at 13.

[65] REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 1971, at 81-82 (1971).

[66] *Commission Hearings*, *supra* note 25, at 393 (joint statement).

[67] *Id.* at 378 (statement of Hon. John C. Godbold).

> the consequently more intense intellectual dialectic arising from a proximate collegiality must suffer.[68]

Moreover, as the number of judges on a court increases, the number of possible panel combinations multiplies. Simultaneously, "[a]s a court grows larger the proliferation of views and of shadings of views increases the number of concurring and special opinions . . . ."[69] It becomes more difficult to keep abreast of the decisions of the other panels,[70] and circulation of opinions prior to release is "hardly feasible."[71] As a result, intracircuit conflicts multiply.[72]

At the same time, the logistical problems of getting 15 judges together to decide a case en banc make resolution of intracircuit conflict more difficult. In discussing the "cost in judge power in any en banc determination when . . . fifteen judges sit to hear oral argument and thereafter participate in conference, to decide a single case," the Commission stated:

> A court of fifteen is the immediate equivalent of five three-judge panels. Not only is the conference more cumbersome and time-consuming, but the process itself is adversely affected: a convention rather than a court, a legislative committee meeting and not a judicial deliberation—these are the pejorative characterizations used by judges.
>
> To this must be added the logistical problems of assuring the presence of all active judges of the court at a single place at a given time, the cost in travel time, and the inefficiencies resulting from scheduling difficulties, whether by delay of the en banc proceedings or by disruption of normal routines.[73]

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[68] *Id.* at 658 (statement of Hon. Irving L. Goldberg).

[69] *Id.* at 378 (testimony of Hon. John C. Godbold).

[70] *Id.* at 393 (joint statement):

> The sheer weight of administrative problems and the necessity of one judge having to deal with 14 others impairs the judicial process. It is very burdensome for each judge to read and carefully analyze all of the opinions of the other 14 judges.

[71] *Id.*

[72] *Id.*

[73] STRUCTURE AND INTERNAL PROCEDURES, *supra* note 19, at 57-58. The joint statement of eight of the active judges of the Fifth Circuit describes the problems in detail:

> Intracircuit conflicts require the convening of *en banc* courts. At the present time [Aug. 1973] there are 11 *en banc* cases to be heard. By the time the court convenes *en banc*, there will probably be at least 15 cases requiring disposition. It is not infrequent that one or two *senior* circuit judges are involved in *en banc* cases. However, assuming only 15 *active* judges are present and allowing at a minimum 10 minutes for each judge to express his views in conference, the deliberations in each case will consume two hours and a half. The 10 minute allotment may itself be unrealistic. In some instances a single judge has consumed substantially over an hour to present his views. But even assuming that

Moreover, the decision whether a particular case will be heard en banc constitutes an additional burden in the large court. Each of 15 judges must give a case sufficient attention to determine, for example, whether an intracircuit conflict exists, or whether the issues are ripe for decision by the circuit as a whole. There is, in addition, an "opposing tension":

> [T]he risk that because of the cumbersome mechanics inherent in a 15-man court's hearing cases, conferring and attempting to agree on the language of opinions, judges will shrink from invoking the en banc machinery for cases that truly deserve the consideration of the entire court.[74]

III. The Commission's Recommendations

These, then, are the considerations which led the Commission to recommend creation of a new judicial circuit from within the present Fifth,[75] to adhere "without reservation" to that recommendation when

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> only the active judges participate and take the minimal time allotment, 15 cases will require 37½ hours of conference time. Eliminating time for lunch and a short recess during the morning and the afternoon, and permitting nine *solid* hours of uninterrupted conference per day, 15 cases will require more than 4 days of conference time. In addition, substantial time must be spent in preparation. While all *en banc* cases are not orally argued, the tendency is toward more oral argument, which adds to the workload. It often happens that a substantial number of judges will agree on one issue, but will be sharply divided on other issues. Since many *en banc* cases present multiple issues, it is virtually impossible to obtain a unanimous decision by 15 judges. Some of our *en banc* decisions require careful mathematical analysis to simply align the positions of the judges according to the issues decided.

Commission Hearings, supra note 25, at 393-94 (joint statement) (emphasis in original). The statement of Judge John Godbold pointed to another risk inherent in the large en banc court—"the silencing effect of a deliberative body's becoming too large":

> [P]articularly in *en banc* multi-issue cases, . . . the individual judge may conclude that there are so many viewpoints to be heard and considered on so many questions that he will not press and perhaps not even express his own views. Or if he presses them they may be lost or obscured in the shuffle.

Id. at 378.

[74] *Commission Hearings, supra* note 25, at 378 (testimony of Hon. John C. Godbold).

[75] The Commission recommended that

> the present Fifth Circuit be divided into two new circuits: a new Fifth Circuit consisting of Florida, Georgia and Alabama; and an Eleventh Circuit consisting of Mississippi, Louisiana, Texas and the Canal Zone.

Geographical Boundaries, *supra* note 3, at 8. The Commission also suggested two other alternatives. Alternative 1 would have an Eastern Circuit composed of Florida, Georgia, Alabama, and Mississippi, and a Western Circuit composed of Texas, Louisiana, Arkansas, and the Canal Zone. Alternative 2 would create an Eastern Circuit containing Florida, Georgia, Alabama, and Mississippi, and a Western Circuit encompassing Texas, Louisiana, and the Canal Zone. *Id.* at 10.

it filed its final report,[76] and to recognize the creation of new circuits as an appropriate solution whenever caseloads exceed the capacity of a court of 13, 14, or perhaps 15 active judges.[77]

Had the final report said no more, there would be no need to elaborate on its implications with respect to circuit realignment. The report, however, did go further. The members of the commission recognized that

> circuit realignment is not a solution which can be adopted automatically wherever caseloads grow. New courts and new circuits bring different problems in their wake. Undue proliferation of circuits increases the potential for inter-circuit conflict even though it enhances unity within each circuit. The Fifth and Ninth Circuits each extends over a geographical area so vast that, even after realignment, the territory covered will be far from minuscule. The situation would be quite different if the creation of additional circuits should lead for example, to a United States Court of Appeals for the southern tip of Manhattan.[78]

The Commission, therefore, concluded that it would be remiss if it did not develop some means of managing the large circuit. After all, as the Commission itself recognized, the "heart of [its] proposal is the creation of additional judgeships to meet developing needs."[79] It would hardly do to insist on procedures which require additional judges, to reject specialized courts, to point to the limited availability of realignment as a practical solution, and to make no provision for accommodating the additional judgeships which were almost certain to be needed. Accordingly, the Commission designed a mechanism which would at least serve to make management of the large circuit feasible and practicable. The mechanism was designed primarily to deal with the problem of the en banc court where the number of judgeships had grown too large. Specifically, the Commission recommended that

> participation in en banc hearings and determinations be limited to nine judges: the chief judge and the eight other active judges of the circuit who are senior in commission but not eligible for senior status.[80]

There are obvious disadvantages to any mechanism which vests control of the law of the circuit in less than the full complement of active judges. To deny any judge the opportunity to participate in an en banc decision is not a happy circumstance. Moreover, the larger the court, the

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[76] STRUCTURE AND INTERNAL PROCEDURES, *supra* note 19, at 59.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 63.

[80] *Id.* at 60. The Commission added: "[J]udges eligible for senior status may continue to participate so long as, and to the extent that, the total number of participants does not exceed nine."

greater the risk that the law of the circuit will reflect the views of a minority of the court. The Commission was mindful of these risks, but preferred them to other more serious disadvantages inherent in each of the available alternatives.

There was, however, one important limitation built into the Commission's recommendation: the proposed method of selection of the judges who would sit on the en banc court was to apply only so long as the en banc court itself did not constitute a minority of the full court. Should that eventuality occur, it would be for the Congress to reconsider the method of selection of the judges empowered to sit en banc in the light of experience. In one sense, this provision may be viewed as a minor detail. In another sense, however, it reveals the deep concern of the Commission with the operation of the excessively large circuit, no matter what the mechanism for its administration. The language of the final report is instructive:

> At the present time there is no federal appellate court so large that the nine who would sit en banc would constitute a minority of the full court. With circuit realignment, the probability of a court so large would be remote and certainly the many disadvantages of such a tribunal make it clear that this is an eventuality to be avoided. Should this eventuality occur, it would only be after a period of experience with the limited en banc and with whatever method of selection is authorized by the Congress. We therefore recommend that Congress reconsider the method of selection of the nine judges who constitute the en banc court, when the nine no longer constitute the majority of the court. Until this point is reached, the proposal put forth by the Commission should achieve the advantages of rotation, neither too rapid for stability nor too long delayed to allow for change.[81]

It must be clear that, in the view of the Commission, the limited en banc cannot be viewed as a preferable alternative to the creation of a new court from within the geographical boundaries of the present Fifth Circuit. A limited en banc of nine would, under the bill now pending in the Senate, already represent substantially less than a majority of the full court.[82] Nor would the limited en banc deal with such issues as assuring the collegiality of the court, the efficiency of the circuit council, and the avoidance of intracircuit conflict. It does not, and cannot, minimize the burdens of having 23 judges participate in the decision of whether a specific case will be heard en banc. In short, nothing in the Commission's final report provides any basis for concluding that re-

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[81] *Id.* at 61-62.

[82] The bill now pending in the Senate would provide 12 judges in the Eastern Division of the Fifth Circuit and 11 in the Western Division. S. 729, 94th Cong., 1st Sess. § 5 (1975).

alignment of the Fifth Circuit, or by parity of reasoning, the Ninth Circuit,[83] can be avoided or should be postponed.

CONCLUSION

The problems of the courts of appeals are too serious and too complex to be expected to yield to a single solution, no matter how creative and innovative. Many improvements will be needed to assure the ability of these courts to cope with their caseloads without sacrifice of the integrity of the judicial process, particularly in the face of increasing demands.

Reform of the law governing the basic jurisdiction of the federal district courts is long overdue.

There may be means of increasing judicial productivity, not in an absolute sense, but rather by way of compensating for losses to be anticipated by affording oral argument in a greater number of cases and reasoned decisions in all.[84] For example, to the extent that added staff, whether assigned to individual judges or to the court as a whole, can serve this purpose, the necessary funds should be provided by Congress.

New judgeships should be created whenever caseloads require. As a result, even with circuit realignment, there may soon be need for a limited en banc, at least in one of the two resulting courts,[85] and Congress should act promptly to implement the Commission's proposal.

In substance, we have before us an arsenal of remedies, each appropriate in certain circumstances, each with anticipated benefits and none without potential disadvantages. No one alone will suffice to solve the problems of a circuit as large and as burdened as the Fifth. Creation of a new court is one of these remedies. It should not be postponed simply because other remedies may also be needed. On the contrary, in a circuit as heterogeneous as the Fifth, with so large a geographic spread and so heavy a caseload, circuit realignment must be considered a necessary first step to assure its continued contribution to the well-being of "our federalism" in contemporary society.

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[83] The bill presently pending would provide 11 judges in the Southern Division and 9 in the Northern. *Id.* For further discussion of the problems of the Ninth Circuit, see note 30 *supra.*

[84] The importance of assuring not only that justice is done, but that it is seen to be done by losing litigants as well as by prevailing parties, should not be underestimated; it is clear that there are limits to what can properly be expected from procedures designed to increase judicial productivity.

[85] See note 82 *supra.* The limited en banc would also be needed in the Southern Division of the Ninth Circuit. See note 83 *supra.*

THE ADMINISTRATION OF JUSTICE IN THE STATE COURTS: AN INTRODUCTION

*The Honorable Robert G. Gillespie**

Increased caseloads and the resulting delays come at a time when courts are expected to vindicate nearly every right, protect society from the criminal element, and adjudicate the complex questions that arise in a changing and complicated society. Courts are under critical appraisal by a questioning and often cynical public. The decline in the public's confidence in the courts is at least partly caused by the upheavals in every area of society and its institutions. But a share of the blame for the inability of the courts to cope with their problems lies in inadequate response of the courts and the bar to these changes.

The nature of the functions of the legal profession tends to make its members resist change. A proper balance, or perspective, requires judges and lawyers to look both forward and backward. The doctrine of stare decisis embodies both stability and change. Dean Pound said the law must be stable, and yet it cannot stand still.[1] Judge Learned Hand said, "[W]e accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action."[2] Holmes once said that we must be faithful to the past, but not too faithful.

The question is: How shall we apply these principles to the matter of adopting procedural rules, now that the court has declared its duty in *Newell v. State*,[3] and the legislature has provided the machinery for an overhaul and modernization of the procedural system?[4]

Changes in procedure do not involve the same problems as do changes in substantive law. Since procedural rules involve method rather than substance, the mere volume of cases is a sufficient reason for devising more efficient methods of disposition. A broader reason is the change in the tempo of the times. The general affairs of society in the 19th century and the early part of the 20th century were slow moving. Litigation today involves business and public enterprises that do not permit the slow pace of years gone by. The courts must make every effort to keep pace with the times.

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* Chief Justice, Mississippi Supreme Court.

[1] Address by Dean Pound, American Bar Association Annual Meeting, 1906.

[2] Address by Judge Learned Hand, Massachusetts Bar Association Annual Meeting, 1942.

[3] 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975).

[4] Act of April 7, 1975, ch. 501, §§ 15-21, [1975] Gen. Laws Miss.; 1975 Sess., Miss. Legis. 9-3.

It now takes 5 to 6 months to prepare and file the trial court record in the Mississippi Supreme Court. This is but one aspect of the delays attending the appellate process. Of course, delay is only one of a number of problems that need solution.

Courts must dispose of cases expeditiously and if there are any available means to do the job better they should be employed.

The bench and bar now have the first opportunity in the history of our state to adopt a modern procedural system. It will take time, study, and dedication on the part of the advisory committee[5] and all who participate in this project. A job well done will be a big step toward the goal of adequately serving the society that has placed awesome responsibility in our hands.

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[5] *Id.* § 17.

MISSISSIPPI RULES OF DISCOVERY

*William Pyle**
*Luther Ott***
*Clark Rumfelt****

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On January 1, 1976, a fundamental change will occur in the practice of law in the State of Mississippi. Under the provisions of Senate Bill No. 2490, all actions filed in the circuit, chancery, and county courts will be subject to extensive new rules of discovery.

These new discovery provisions represent a basic change in the process by which lawsuits will be tried in Mississippi. Litigants will be required to produce, prior to trial, all relevant information related to the issues in litigation. Attorneys will no longer be permitted to conceal witnesses or factual data in order to "spring" them at the trial of the cause.

The new Mississippi discovery provisions, with several minor exceptions, follow verbatim the discovery provisions of the Federal Rules of Civil Procedure. By using the exact language of the federal rules the legislature obviously intended to adopt not only the basic rules themselves, but also the substantial body of law which has developed interpreting these rules. This should lead to a uniformity of procedures between the state and federal courts in Mississippi. The benefits of such uniformity are obvious.

In this article we have relied on the application by the federal courts and by the courts of other states of rules identical to the new Mississippi

discovery provisions. We have also extensively utilized the work of leading commentators on the federal rules to review the purpose and impact of such rules.[1] It is our hope this will provide some assistance to practitioners seeking additional sources of information on the new provisions.

I. History and Purpose

The need for substantial revision in Mississippi's discovery procedures has long been recognized. O. B. Triplett, Jr., writing in the 1943 *Mississippi Law Journal*,[2] noted the need for reform of our "hocus-pocus legal procedures":

> The law of procedure in Mississippi should provide the machinery for the accurate, rapid and economical settlement of litigated controversies. But more often our procedural process has become an end in itself and the settlement of controversies has been made to depend less upon their merits in law and fact than upon a trial by combat, a combat of lawyer's wits. Hocus-pocus procedure it is to the laity.[3]

Triplett went on to set forth the basic principles of procedural reform in which all responsible attorneys would certainly concur:

> All can agree that, in its objectives, pre-trial procedure should embrace the following: (1) a simplification of the pleadings; (2) an accurate formulation of the issues to be tried; (3) the elimination of trials by settlement and summary judgments wherever possible; (4) the avoidance of surprise; (5) economy of time and money to the parties and the public; and (6) the elimination of specious procedural tactics which enable a litigant with a long purse and a wily lawyer to weary his adversary into settling his claim on a nuisance basis.[4]

Almost 20 years later L. G. Fant, Jr. surveyed the discovery procedure available to Mississippi attorneys and found—with the exception of the procedure for directing interrogatories to out-of-state attorneys, first adopted by the Code of 1880—the limited Mississippi discovery procedure was substantially the same as that found in the Code of 1857. Fant summarized his findings as follows: "These are the tools of discovery presently available to the Mississippi lawyer in the courts of this state. With a single exception, they were available to his greatgrandfather."[5]

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[1] The two most frequently cited commentators are J. Moore, Federal Practice (2d ed. 1974) [hereinafter cited as Moore] and C. Wright & A. Miller, Federal Practice and Procedure (1970) [hereinafter cited as Wright & Miller].

[2] Triplett, *Hocus-Pocus Legal Procedure—A Need for Reform*, 16 Miss. L.J. 9 (1943).

[3] *Id.* at 9.

[4] *Id.* at 10.

[5] Fant, *Procedural Reform in Mississippi Part I*, 34 Miss. L.J. 40, 46 (1962).

In other areas of the country reform of antiquated court procedures advanced more rapidly. This culminated with the adoption of the Federal Rules of Civil Procedure in 1937. Twenty-eight years ago the United States Supreme Court, in the landmark decision of *Hickman v. Taylor*,[6] summarized the impact of modern federal discovery and explained the purposes behind this reform:

> The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[7]

The Court went on to say:

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiry into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[8]

The Court reaffirmed this view in *United States v. Procter & Gamble Co.*:[9]

> Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor* . . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest

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[6] 329 U.S. 495 (1947).
[7] *Id.* at 500-01.
[8] *Id.* at 507.
[9] 356 U.S. 677 (1958).

> with the basic issues and facts disclosed to the fullest practicable extent.[10]

The experience with the federal rules was generally favorable, and many jurisdictions adopted all or substantial portions of the rules.[11]

In 1975 the Mississippi Legislature acted decisively to revise completely the state's discovery procedures and to provide a vehicle for further modernization of all procedural aspects of Mississippi practice: Senate Bill No. 2490 was enacted.

II. Section 2. Scope of Discovery

The most significant change accomplished by the new legislation is the complete reform in the purpose and scope of discovery in Mississippi. In prior Mississippi cases the courts had rigidly interpreted discovery statutes to limit the function of discovery to furnishing *evidence*.[12] Matters which could be reached by discovery were limited to matters "competent, relevant and material on the trial."[13]

The new discovery statutes expressly discard this policy in favor of a policy requiring the complete disclosure of all relevant material prior to trial:

> (2) *Scope of Discovery*. Unless otherwise limited by order of the court in accordance with Sections 1 through 14 of this act, the scope of discovery is as follows:
>
> (a) *In general*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will

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[10] *Id.* at 682 (citation omitted and emphasis added).

[11] Jurisdictions adopting rules substantially similar to the federal rules include: Alaska, Arizona, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Kentucky, Maine, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Five states formulated their own rules, but drew heavily on the federal rules: Florida, Iowa, Missouri, Pennsylvania, and Texas. Seven states have adopted the rules on discovery, joinder, or both: Alabama, Arkansas, California, Connecticut, Illinois, Louisiana, and New York. 1 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 9-9.53, at 43-80 (C. Wright ed. 1961), 5-8 (Supp. 1974).

[12] Garraway v. Retail Credit Co., 244 Miss. 376, 387, 141 So. 2d 727, 731 (1962); Morrison v. Guaranty Mortgage & Trust Co., 191 Miss. 207, 227, 199 So. 110, 115 (1941).

[13] Electric Reduction Co. v. Crane, 239 Miss. 18, 30, 120 So. 2d 765, 770 (1960).

> be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[14]

This language is identical to that found in rule 26(b)(1) of the Federal Rules of Civil Procedure.

In interpreting those provisions, the courts have clearly recognized that the language used in section 2(2)(a) gives discovery a broad scope. This rule "apparently envisions generally unrestrictive access to sources of information, and the courts have so interpreted it."[15] The Supreme Court of the United States in *Hickman* spoke to the issue of the proper scope of the discovery rules, requiring that "the deposition-discovery rules are to be accorded a broad and liberal treatment. . . . [E]ither party may compel the other to disgorge whatever facts he has in his possession."[16]

The rationale of the courts in permitting broad discovery under the federal rules is the distinction between the right to secure *access* to information and the right to *use* that information at the trial. Under this approach

> the utmost freedom is allowed in taking depositions; restrictions are placed upon their use. As a result there is accorded the widest possible opportunity for knowledge by both parties of all the facts before the trial. Such of this testimony as may be appropriate for use as a substitute for viva voce examination may be introduced at the trial; the remainder of the testimony having served its purpose and revealing the facts to the parties before trial, drops out of the judicial picture. This is the central notion of the deposition discovery practice provided by the new Federal Rules of Civil Procedure.[17]

A. Relevancy

The new statute allows discovery "regarding any matter . . . relevant to the subject matter."[18] This language has not changed since it was first used in the original federal rule 26 in 1937. Several early court decisions on the federal rules seized upon this language to restrict discovery by establishing distinctions between such factors as substantive and procedural matters. These restrictive interpretations led in 1946 to the adoption of the last paragraph of the section which established

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[14] Act of April 7, 1975, ch. 501, § 2(2)(a), [1975] Gen. Laws Miss. [Hereinafter, this act will be cited only by section number, *e.g.*, section 2(2)(a)].

[15] 8 WRIGHT & MILLER § 2007, at 37.

[16] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

[17] Pike & Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1187 (1938). *See also* 8 WRIGHT & MILLER § 2007, at 38.

[18] Section 2(2)(a).

firmly that this language was to be given the broadest possible scope.[19] The protection of parties from discovery was left to specifically established restrictions such as the provisions dealing with privileged matters and "work product."

Relevancy is not limited to issues precisely set out in the pleadings but is measured by the "general relevancy to the subject matter."[20] It is impossible to define with precision what is encompassed by the phrase "relevant to the subject matter involved." However, as has been noted by leading commentators on the federal rules,

> [c]ertainly the requirement of relevance should be construed liberally and with common sense, rather than in terms of narrow legalisms. No one would suggest that discovery should be allowed of information that has no conceivable bearing on the case. But it is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action. If protection is needed, it can better be provided by the discretionary powers of the court under Rule 26(c)[section 2(3) of the Mississippi Act] than by a constricting concept of relevance.[21]

B. Privileged Matter

Section 2(2)(a) of the new Mississippi discovery provisions allows the discovery of any relevant matter "not privileged." As noted above, the language used is identical to that used in rule 26(b)(1) of the Federal Rules of Civil Procedure. Decisions interpreting this portion of the federal rules have generally held that discovery examinations are governed by the same grounds of privilege recognized at the actual trial.[22]

Communications between a client and his attorney are usually privileged. The fact that a party has communicated information to his attorney, however, does not prevent the discovery of that information from the party. A distinction is drawn between legal advice and opinions given to a party by his attorney, both of which are privileged, and information gained by the attorney or other representative of the party in the course of investigating the case. In the latter situation the information may not be privileged.[23] An example of the operation of the rule is cited by Professor James B. Moore in dealing with the disclosure of information on witnesses:

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[19] 4 MOORE ¶ 26.56[1], at 26-116 to -117.

[20] *Id.* at 26-120 to -122.

[21] 8 WRIGHT & MILLER § 2008, at 45-47 (footnotes omitted).

[22] 4 MOORE ¶ 26.60[1], at 26-225; *see, e.g.*, R. & J. Dick Co. v. Bass, 295 F. Supp. 758 (N.D. Ga. 1968) (husband-wife privilege); Weber v. Battle, 11 FED. RULES SERV. 2d 34.41, case 5 (S.D.N.Y. 1968) (brokerage firm); Cimizotti v. Paulsen Co., 219 F. Supp. 621 (N.D. Iowa 1963) (priest-penitent).

[23] 4 MOORE ¶ 26.60[2], at 26-229 to -334.

> Ordinarily information as to the "identity and location of persons having knowledge of any discoverable matter" is sought from the opposing party by interrogatory under Rule 33 or by asking the party at the taking of his deposition under Rule 30. When it is sought in this fashion, no problem of attorney-client privilege arises, and it has been held repeatedly that such information is not work product so as to require a showing of special circumstances. Thus the deponent or interrogated party cannot avoid an answer on the ground that the names were learned by counsel in the course of investigation, and this is true though the names were given to counsel by another attorney in confidence and on express promise that they not be revealed to opposing counsel. Nor may the interrogated party or deponent plead personal ignorance of the names on the ground that they are known only to his attorney.[24]

Communications between physician and patient have usually been held privileged, unless waived. Although professional privilege has been sought on behalf of other groups, most courts have refused to recognize it outside the attorney-client and physician-patient relationships.[25]

C. Insurance Agreements

Section 2(2)(b) follows verbatim federal rule 26(b)(2):

> A party may obtain discovery of the existence and contents of any insurance agreement under which any party carrying on an insurance business may be liable to satisfy part or all of the judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

This provision was added to the Federal Rules of Civil Procedure by the 1970 amendments to settle conclusively the issue of whether the existence and contents of liability insurance agreements were relevant and subject to discovery. The provision permits such discovery since

> [d]isclosure of insurance coverage will enable counsel for both sides to make the realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect.[26]

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[24] *Id.* ¶ 26.57[2], at 26-200 to -201; *see* 8 WRIGHT & MILLER § 2021, at 178-82.

[25] 4 MOORE ¶ 26.60[2], at 26-238 to -240. *See, e.g.*, Hare v. Family Publications Serv., Inc., 15 FED. RULES SERV. 2d 838 (D. Md. 1971); Mattson v. Cuyana Ore Co., 178 F. Supp. 653 (D. Minn. 1959).

[26] FED. R. CIV. P. 26, Advisory Committee Note, 28 U.S.C.A. at 156.

Section 2(2)(b) does not permit discovery of other information concerning a defendant's financial status, and this information is ordinarily not discoverable.[27] The final sentence of the section excluding insurance applications from the effect of the rule was based on this consideration: "The insurance application may contain personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision."[28]

The rule is designed to cover insurance companies but not self-insurers or ordinary business concerns that enter into contracts of indemnification.[29] The party seeking discovery is entitled to the entire insurance agreement and is not confined to the policy limits. The rule expressly provides for the discovery of the existence and *contents* of insurance agreements.[30]

Rules regarding the admissibility of insurance policies at trial have not been changed. Thus, under the existing Mississippi law, any reference to insurance coverage in the presence of the jury may result in a mistrial.[31]

D. Work Product

Section 2(2)(c) of the Act adopts verbatim rule 26(b)(3) of the Federal Rules of Civil Procedure:

> (c) *Trial preparation: materials.* Subject to the provisions of subsection (2) (d) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (2) (a) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject mat-

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[27] 8 WRIGHT & MILLER § 2010, at 93.

[28] FED. R. CIV. P. 26, Advisory Committee Note, 28 U.S.C.A. at 156.

[29] 8 WRIGHT & MILLER § 2010, at 93.

[30] *Id.* at 94. *But see* 4 MOORE ¶ 26.62[2], at 26-231 to -234.

[31] Chilcutt v. Keating, 220 Miss. 545, 71 So. 2d 472 (1954).

> ter previously made by that person. If the request is refused, the person may move for a court order. Section 12 (1) (d) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

This provision was added to the Federal Rules of Civil Procedure by amendment in 1970 to clarify a troublesome area by providing the extent to which the "work product" of a party, an attorney, or other agent of a party could be reached through discovery.

The principle of the work product rule is more easily understood if it is thought of as a qualified immunity, rather than a privilege. The privilege does not broaden the scope of discovery beyond that contained in section 2(2)(a).

> Thus even though sufficient showing can be made to overcome the work product immunity, documents and other things are not discoverable if they are privileged or if for some other reason they are not completely within the scope of discovery defined by Rule 26(b)(1) [section 2(2)(c)].[32]

The language used in section 2(2)(c) has been cited as establishing the following concepts. The language

> (1) defines the class of materials that are given protection as work product, (2) sets out the showing required to obtain discovery of work product material, (3) gives absolute protection to an attorney's mental impressions, legal theories, and the like, (4) allows a party to obtain a copy of his own statement without a special showing, and (5) creates machinery by which a person not a party to the litigation who has given a statement concerning the action may obtain a copy of his own statement.[33]

To come within the qualified immunity of the work product rule, three tests must be satisfied. "The material must be: 1. 'documents and tangible things;' 2. 'prepared in anticipation of litigation or for trial;' and 3. 'by or for another party or by or for that other party's representative.' "[34]

The protection of the rule is limited to "documents and tangible things." A distinction is drawn between documents a party has assembled and the facts he has learned from those documents. This rule is

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[32] 8 WRIGHT & MILLER § 2024, at 196.

[33] *Id.* § 2023, at 193.

[34] *Id.* § 2024, at 196-97.

intended to carry forward the provision of *Hickman v. Taylor* that "[a] party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney."[35] Professors Charles Alan Wright and Arthur R. Miller commented on this distinction by noting:

> The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.[36]

The use of the term "representative" in this section has been generally construed to extend work product protection to statements obtained by claims agents and investigators and other agents of the party or a party's indemnitor.[37]

The great bulk of the cases hold that photographs, diagrams, and the like made at or about the time of the occurrence giving rise to the suit are discoverable.[38]

Even if a document or thing falls within the protection of the work product rule, a court can still order it produced if the party seeking discovery can meet the burden of showing a compelling necessity for the production of the item. Section 2(2)(c) establishes the standard that even work product will be subject to discovery,

> only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Normally, if the party seeking discovery can obtain the information by taking the deposition of a witness, the discovery of the work product should be denied. On the other hand, if a witness is not available, this may in some circumstances constitute a sufficient showing to justify ordering production of prior statements of the witness. Some courts have extended this to permit discovery of statements by hostile witnesses who

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[35] Hickman v. Taylor, 329 U.S. 495, 504 (1947).

[36] 8 WRIGHT & MILLER § 2023, at 194.

[37] *E.g.*, Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950); Ownby v. United States, 293 F. Supp. 989 (W.D. Okla. 1968); United States v. American Optical Co., 37 F.R.D. 233 (E.D. Wis. 1965); Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); *see* 8 WRIGHT & MILLER § 2024, at 204-07.

[38] *E.g.*, Atlantic Greyhound Corp. v. Lauritzen, 182 F.2d 540 (6th Cir. 1950); Hughes v. Groves, 47 F.R.D. 52 (W.D. Mo. 1969); Kagan v. Langer Transp. Corp., 43 F.R.D. 404 (S.D.N.Y. 1967); *see* 8 WRIGHT & MILLER § 2024, at 208.

cannot be forced to testify through the use of sanctions. A number of courts have permitted discovery of statements taken at or about the time of the occurrence giving rise to the action on the theory the memory of the witness is more complete at that time.[39]

If a court finds that discovery of work product should be permitted, section 2(2)(c) narrows the scope of the discovery by requiring that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

E. Experts

(d) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (2) (a) of this section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(i) (1) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (2) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (2) (d) (iii) of this section, concerning fees and expenses as the court may deem appropriate.

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) Unless manifest injustice would result, (1) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (2) (d) (i) (2) and (2) (d) (ii) of this section; and (2) with respect to discovery obtained under subsection (2) (d) (i) (2) of this section the court may require, and with respect to discovery obtained under subsection (2) (d) (ii) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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[39] 8 WRIGHT & MILLER § 2025, at 215-21.

Section 2(2)(d) divides experts into four classes and deals separately with each:

> (1) Experts a party expects to use at trial. The opponent may learn by interrogatories the names of these trial witnesses and the substance of their testimony but further discovery concerning them can be had only on motion and court order.
> (2) Experts retained or specially employed in anticipation of litigation or preparation for trial but not expected to be used at trial. . . . [T]he facts and opinions of experts in this category can be discovered only on a showing of exceptional circumstances.
> (3) Experts informally consulted in preparation for trial but not retained. No discovery may be had of the names or views of experts in this category.
> (4) Experts whose information was not acquired in preparation for trial. This class, which includes both regular employees of a party not specially employed on the case and also experts who were actors or viewers of the occurrences that gave rise to the suit, is not included within [section 2(2)(d)] at all and facts and opinions they have are freely discoverable as with any ordinary witness.[40]

In the first case, that of experts which a party *expects* to use at trial, the opposing party first obtains by interrogatories basic information about the expert. If the answer to the interrogatory is not fully responsive, the party seeking discovery can seek an order requiring a further answer. If after answering the interrogatories a party later decides to call another expert, he is under a duty to file a supplemental answer to the interrogatories. If a party attempts to use an expert whom he has failed to disclose to the opposing party in responding to appropriate interrogatories, the court may refuse to permit the expert to testify.[41]

Because there will be no additional cost involved in obtaining the testimony, the party seeking this initial discovery through interrogatories will not be required to pay fees and expenses as provided in this section for further discovery of expert testimony.[42]

After securing the response to his interrogatories, a party may elect to seek further discovery of an expert's testimony by deposition. To do so, he must make a formal motion to the court, and the court has the discretion to grant or deny the motion. If the motion is granted, the court would ordinarily require the party seeking discovery to pay the expert a reasonable fee for his time in responding to the further discovery, and the court is authorized, if it chooses, to require the deposing

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[40] *Id.* § 2029, at 250-51.

[41] *See* Taggart v. Vermont Transp. Co., 32 F.R.D. 587 (E.D. Pa. 1963), *aff'd*, 325 F.2d 1022 (3d Cir. 1964); 8 WRIGHT & MILLER § 2030, at 252.

[42] 8 WRIGHT & MILLER § 2030, at 252.

party to pay the party who retained the expert a reasonable share of the fees and expenses incurred in obtaining facts and opinions from the expert.[43] In entering its order allowing further discovery, the court may place such restrictions on the scope of discovery as the court deems appropriate.[44]

In the case of experts who will not be called as witnesses, the party may obtain the facts known or opinions held by such experts only upon a showing that it is impracticable for the party "to obtain facts or opinions on the same subject by other means."[45] If the requirements are met and discovery is ordered, the party seeking discovery must provide a reasonable fee to the expert for his time and pay a proportionate share of the expenses charged to the party retaining the expert.[46]

A party may not obtain discovery of any information acquired from experts informally consulted but not retained in regard to the litigation.

> Subdivision (b)(4)(B) [of federal rule 26, to which section 2(2)(d)(ii) corresponds] is concerned only with experts retained or specially consulted in relation to trial preparation. Thus, the subdivision precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed. As an ancillary procedure, a party may on proper showing require the other party to name experts retained or specially consulted, but not those informally consulted.[47]

An expert not retained or specially employed for the litigation is treated as an ordinary witness.

> It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.[48]

Thus, an expert regularly employed by a party is treated as an ordinary witness. Similarly, a party who is himself an expert, such as a physician, will be subject to discovery in regard to all facts known and opinions held by him.[49]

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[43] *Id.* § 2031, at 253-54.

[44] *E.g.*, Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972); *see* 8 WRIGHT & MILLER § 2031, at 253-54.

[45] Section 2(2)(d)(ii).

[46] 8 WRIGHT & MILLER § 2032, at 255-57.

[47] FED. R. CIV. P. 26, Advisory Committee Note, 28 U.S.C.A. at 161.

[48] *Id.* at 160.

[49] 8 WRIGHT & MILLER § 2033, at 258.

F. Protective Orders

> (3) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (a) that the discovery not be had; (b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (e) that discovery be conducted with no one present except persons designated by the court; (f) that a deposition after being sealed be opened only by order of the court; (g) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; (h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; (i) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.
>
> If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 12 (1) (d) applies to the award of expenses incurred in relation to the motion.

If a party wishes to object to any discovery procedure used by the opposing party, the objecting party *must* seek a protective order under section 2(3). Failure seasonably to move may result in a waiver of the objection. Section 12(4), which deals with sanctions against parties who fail to respond to discovery, specifically provides:

> The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Section 2 (3).

The application for a protective order is made to the court in which the action is pending. While there is no express time limit, the motion should be made, when possible, well enough in advance of the discovery to avoid undue expense and hardship on the opposing party. Otherwise, the moving party may run some risk of being held responsible for such expenses even if he prevails on his motion for a protective order.[50]

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[50] *Id.* § 2035, at 266-67. See section 12(4) at part XII *C infra*.

The party seeking the protective order has the burden of demonstrating "good cause" for the order.[51] This section provides that a protective order may be entered "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." It is impossible to establish precise rules for entering such orders, but the request for discovery should be unreasonable or improper before discovery is restricted. A determination of this issue is within the discretion of the trial court.[52]

It would be incorrect to say that factors such as the need for the discovery or the burden of responding to the discovery create absolute limits of permissible discovery. The court in weighing a motion for a protective order should neither unduly restrict discovery nor impose on a party the court's own concept of what the party "needs" to prepare its case. Nor should the burden of responding to the discovery serve as a basis for a protective order where the discovery is necessary and appropriate. However, the court may weigh such factors, and as the need for the discovery becomes less apparent the question of whether the expense creates an undue burden on the respondent party becomes more significant.[53]

Federal rule 26(c) provides eight suggested devices which the court might consider in granting protective orders. This list is not exclusive, and the court may be as innovative as necessary to provide proper protection.

The scope of the Mississippi trial courts' discretion to fashion any appropriate remedy is precisely set out in section 2(3) of the Act which, in addition to the eight suggested devices in the federal rule, provides:

> [T]he court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.[54]

This provision suggests that in appropriate cases, the court might require the parties seeking discovery to pay expenses involved in the discovery procedure. While this section is not specific, it presumably could include the payment of legal fees and expenses incurred by a party

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[51] 8 WRIGHT & MILLER § 2035, at 264-65.

[52] *E.g.*, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1163 (1974). *See* 8 WRIGHT & MILLER § 2036, at 268.

[53] *E.g.*, General Tel. & Electronics Laboratories, Inc. v. National Video Corp., 297 F. Supp. 981 (N.D. Ill. 1968); United Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.6 (D. Del. 1960); *see* 8 WRIGHT & MILLER § 2036, at 270.

[54] Section 2(3)(i). See section 2(3) for a complete list.

in responding to discovery.

One specific protective order noted by both the state and federal procedure is an order that "discovery not be had."[55] Normally this would pertain to interrogatories or the production of a particular document since, in those situations, the court has the full scope of discovery in writing. Even with these discovery procedures, however, the courts should be hesitant to grant protective orders unless clearly warranted by the facts of the case.[56]

In regard to depositions it is even more difficult to conceive of a situation in which a court should prohibit the taking of a deposition entirely since under the provisions of section 6(4) a party can seek a motion to terminate or limit the examination at any time during the course of a deposition. Additionally, the test of relevancy is extremely broad in modern discovery. Even claims by witnesses that they had no knowledge of any relevant facts have been held not to constitute grounds for a protective order completely disallowing the deposition since the party seeking to take the deposition is entitled to test the witness' allegations.[57]

The final sentence of section 2(3) provides that the court, in denying in whole or part a motion for a protective order, may enter an affirmative order requiring the moving party to provide or to permit discovery. Counsel seeking discovery should make certain that the order overruling the motion for the protective order includes such affirmative provisions for discovery; this may allow him to invoke the sanctions under section 12(2)(b) of the Act if the opposing party continues to refuse to permit discovery after an affirmative order.[58]

G. Sequence and Supplementation of Discovery

The remainder of section 2 consists of two provisions dealing with the sequence and timing of discovery[59] and with the supplementation of responses to discovery.[60] The provisions are largely self-explanatory:

> (4) *Sequence and timing of discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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[55] Section 2(3)(a); FED. R. CIV. P. 26(c)(1).

[56] *See* 8 WRIGHT & MILLER § 2037, at 271-72.

[57] *Id.* at 272-76.

[58] *Id.* § 2035, at 266-67.

[59] *See generally* 4 MOORE ¶ 26.80; 8 WRIGHT & MILLER §§ 2045-47.

[60] *See generally* 4 MOORE ¶ 26.81; 8 WRIGHT & MILLER §§ 2048-50.

(5) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(a) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(b) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

III. Section 3. Perpetuation—Depositions Before Action or Pending Appeal

Section 3, which is equivalent to rule 27 of the Federal Rules of Civil Procedure, provides an effective and convenient method of perpetuating testimony prior to the commencement of an action or pending appeal.[61] All that is required to initiate the procedure under the section is a verified petition filed by a person who expects to be a party to a matter cognizable in any court of this state, and a finding by that court that the testimony may prevent a failure or delay of justice. Section 3 is designed to perpetuate testimony, but it also authorizes the court to make an order for production of documents and inspection of things under section 10 for use in a future action. With this idea in mind—perpetuating testimony and other *evidence*[62]—the scope of discovery under section 3 may be more limited than that provided under section 2(2).[63]

Section 3 should not be considered merely as allowing discovery before an action commences to glean the facts for a later cause of action, and it is up to the court, in considering the petition, to prevent this

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[61] *See* 4 Moore ¶¶ 27.01-.21; 8 Wright & Miller § 2071, at 330.

[62] "The overall objective of [Federal] Rule 27 is to perpetuate *evidence* for use in a prospective action . . . ." 4 Moore ¶ 27.13, at 1833 (emphasis added).

[63] *See* 8 Wright & Miller § 2071, at 332, § 2072, at 338; notes 80, 81 & 88 and accompanying text *infra*. The United States Supreme Court has required the testimony sought be material and competent. Arizona v. California, 292 U.S. 341 (1934); *see* 4 Moore ¶ 27.09, at 1829 n.4.

abuse where there is no danger of loss of testimony.[64] However, in a situation in which a prospective plaintiff could show in his petition that he would have a cause of action if he could perpetuate a certain material fact, the procedure may be allowed.[65]

A. *Before Action*

> (1) *Before action.* (a) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit or chancery court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: (i) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and his interest therein, (iii) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (iv) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

The first sentence of subsection (1)(a) provides three important points—jurisdiction, venue, and form of initiation. A person who expects to be a party initiates the proceeding to perpetuate testimony regarding "any matter that may be cognizable in any court of this state." This has reference to jurisdiction,[66] and the petitioner should set forth the grounds of expected jurisdiction in his petition.[67] The statute by its terms confers jurisdiction of the proceeding on the chancery and circuit courts in the proper county. Venue for filing the petition lies in the circuit or chancery court in the *county of the residence* of any expected adverse party.[68] Petitions may not be filed in any county court,

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[64] 4 MOORE ¶ 27.07[4], at 1827; 8 WRIGHT & MILLER § 2071, at 332-33.

[65] 4 MOORE ¶ 27.07[4], at 1826.

[66] *Id.* ¶ 27.03, at 1813.

[67] This requirement is discussed in the text accompanying notes 70 & 71 *infra*. In the federal courts,

> a petition to perpetuate testimony is supported by the grounds of jurisdiction which will support the expected action when it is or may be instituted at some future date. . . . [I]t must appear at the time of the filing of the petition that the expected action is within the jurisdiction of the federal courts.

4 MOORE ¶ 27.03, at 1813.

[68] *See generally* 4 MOORE ¶ 27.04, at 1816; Daniel & Sams, *Jurisdiction and Venue*, in CIRCUIT COURT PRACTICE 35 (Mississippi Law Institute 1966).

even though the Act is applicable to county courts, since not all counties have such courts. The form of initiation is a verified petition entitled in the name of the petitioner.[69]

Substantively, the subsection requires five allegations in the petition: (1) The petitioner must show he expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought. This allegation includes the jurisdictional requirement mentioned above.[70] A petition should be insufficient if it shows the petitioner is presently unable to bring the action because of absence of jurisdiction.[71] The manner by which the petitioner shows the expectancy of an action in which he will be a party will depend, of course, on whether he expects to be a plaintiff or defendant. In either case a substantial expectancy should be shown by facts,[72] and this is especially true if the petitioner expects to be a defendant.[73] It is not essential that a cause of action have accrued to the petitioner or potential adverse parties.[74]

"Permission to perpetuate testimony for use in an expected action has always been denied when the subject matter of the expected action could be made the subject of an immediate action."[75] Thus, the petitioner must show he is presently unable to bring the action or cause it to be brought. Accordingly, if the state and federal courts have concurrent jurisdiction over the matter (the matter is cognizable), and the petitioner is presently able to bring it or cause it to be brought in federal court, but not in state court (due to lack of personal jurisdiction, for example), the petition in state court should be denied.[76]

"The right to perpetuate testimony 'does not depend on the condition of the witness, but upon the situation of the [petitioner] and his power to bring his rights to an immediate investigation.' "[77] The illness of a witness alone, therefore, should not be sufficient grounds to perpetuate his testimony.[78]

(2) The petitioner must show the subject matter of the expected action and his interest therein.

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[69] For a suggested form, see Appendix I.

[70] See text accompanying note 67 *supra*.

[71] *See* 4 MOORE ¶ 27.07[2], at 1821.

[72] *See* 8 WRIGHT & MILLER § 2072, at 337.

[73] 4 MOORE ¶ 27.07[2], at 1821.

[74] *Id.*

[75] *Id.* at 1822.

[76] "The petition must show that the petitioner is presently unable to bring the expected action or cause it to be brought in *any* court, state or federal." *Id.*

[77] *Id.* at 1823, *quoting* Hall v. Stout, 4 Del. Ch. 269 (Ch. 1871). This case was approved in Westinghouse Mach. Co. v. Electric Storage Battery Co., 170 F. 430 (3d Cir. 1909).

[78] *In re* Carson, 22 F.R.D. 64 (E.D. Ill. 1957); 4 MOORE ¶ 27.07[3], at 1823 n.8; 8 WRIGHT & MILLER § 2072, at 337 n.23.

> The petitioner should indicate the subject matter, and it [should be] sufficient if he shows that his interest in the subject matter is such that there is a substantial expectancy that he will be a party to the expected action.[79]

(3) The petitioner must show the facts which he desires to establish by the testimony and his reasons for perpetuating it. A brief statement of the facts sought to be established should suffice, especially in light of requirement (5) which calls for the substance of the testimony the petitioner expects to elicit. The facts sought should be material and competent.[80] "If facts could not conceivably be material or competent in the expected action, perpetuation of testimony . . . would not prevent a failure or delay of justice."[81] The court must be convinced that perpetuation of the testimony will prevent a failure or delay of justice before an order allowing the deposition may be entered.[82] If some of the facts are material and competent and others are not, the order should specify and exclude the impermissible matter. If no facts are conceivably material and competent the entire petition should be denied.[83]

A petitioner must set out his reasons for perpetuating the testimony under this requirement, and the reasons "must show a danger of losing the evidence by delay."[84] The reasons for seeking the testimony should, if the circumstances warrant, show the danger of the loss with some specificity.[85] In many cases, however, a showing by the petitioner that he is presently unable to bring the action or cause it to be brought may be a sufficient showing of the danger of the loss of the evidence by delay.[86]

(4) The petitioner must set out the names or a description of the persons he expects will be adverse parties and their addresses so far as known. This requirement should primarily aid in fulfilling the provision

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[79] 4 MOORE ¶ 27.08, at 1828-29.

[80] *Id.* ¶ 27.09, at 1829; 8 WRIGHT & MILLER § 2072, at 338-39. Both treatises cite Arizona v. California, 292 U.S. 341 (1934). The standards of materiality and competency, however, should not be as stringent as if the issues had been framed in the pleadings. Thus, if the facts are "conceivably" material and competent, the order to perpetuate should be granted. *Id.* at 360; 4 MOORE ¶ 27.09, at 1829; see note 63 and accompanying text *supra*; notes 81, 88 & 105 and accompanying text *infra*.

[81] 4 MOORE ¶ 27.09, at 1829, ¶ 27.16, at 1840; see note 80 *supra*.

[82] Section 3(1)(c) requires this. See note 105 and accompanying text *infra*.

[83] *See* 4 MOORE ¶ 27.09, at 1829.

[84] *Id.* at 1830.

[85] *Id.*; 8 WRIGHT & MILLER § 2072, at 339. For example, the witness' imminent death or perhaps the fading of memory as an attendant hazard of lapse of time, or any other reasons for danger of loss, should be briefly set out in the third requirement. If nothing more, this would give the court some familiarity with the circumstances before the hearing. *See* Mosseller v. United States, 158 F.2d 380 (2d Cir. 1946).

[86] 4 MOORE ¶ 27.09, at 1830.

of section 3(1)(c) for service of notice upon adverse parties. If a name or address is not known, the petition should contain a sufficient description of a class or group to which the expected adverse party belongs in order to aid the court in formulating a procedure to notify them by publication or otherwise.[87]

(5) The petitioner must show the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each. Requirement (5), by its terms, indicates the procedure under section 3 is not one of discovery,[88] which in turn strengthens the general proposition that the proposed testimony should be relevant, material, competent, and needed to prevent a failure or delay of justice.[89] It should be sufficient under this requirement to state the substance of the testimony in general terms.[90]

The substantive part of the petition should conclude with a prayer for an order authorizing the petitioner to take the depositions of the specified persons to be examined for the purpose of perpetuating their testimony.[91]

B. Notice and Service

> (b) *Notice and service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served in the same manner of service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided by law, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent.

After filing the verified petition, the petitioner is required to serve notice upon each person named in the petition as an adverse party. The notice must state that the petitioner will apply to the court at a named time for an order, and it must be served at least 20 days before the date of the hearing[92] in the manner of a summons.[93]

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[87] *Id.* ¶ 27.10, at 1831; see notes 94 through 97 and accompanying text *infra*.

[88] 8 WRIGHT & MILLER § 2072, at 340.

[89] *See* 4 MOORE ¶ 27.11, at 1831; notes 2, 80 & 81 and accompanying text *supra*.

[90] 8 WRIGHT & MILLER § 2072, at 340.

[91] See appendix I.

[92] 4 MOORE ¶ 27.14, at 1834-35 n.2. In extreme cases where the circumstances warrant, the court should have the ability to change the 20-day notice requirement, especially if

If personal service is unavailable after due diligence[94] because of absence, unknown identity, or some other reason specified under requirement (4) of the petition,[95] the court shall make such order as is just for service by publication or otherwise.[96] For persons served by publication or otherwise, the court shall appoint an attorney to represent that person. If a probable adverse party served by publication is not otherwise represented at the hearing on the petition, the attorney appointed by the court will represent the party. If the expected adverse party is not otherwise represented at the taking of the deposition, the attorney appointed by the court will cross-examine the deponent.[97]

Section 3 makes no provision for compensation of the appointed attorney, and this will undoubtedly lead to confusion and dispute. The omission is a clear case for legislative action with or without the Advisory Committee's recommendation.[98] Other states with similar discovery provisions have provided that the person bringing the proceeding should bear the costs of appointing an attorney.[99]

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the expected parties agree to such a change. *Cf.* Sims v. Abrams, 389 F.2d 148 (5th Cir. 1967).

Parties themselves, under section 5 of the Act (see part V *infra*) have the ability to change certain time requirements by stipulation. However, section 5 does refer to *parties*, and technically, participants in section 3 proceedings are not parties.

[93] See MISS. CODE ANN. §§ 13-3-1 to -63 (1972). All of the requisites of service of a summons should be met, and service may be personal, or by leaving a copy of the summons at the person's home with his wife or some other willing relative over 16 years old, or if neither of the above methods are possible, by posting a copy of the summons on the door of the person's usual place of abode. *Id.* § 13-3-33.

[94] "What constitutes 'due diligence' will depend largely upon the degree of urgency or immediacy of the necessity for perpetuating the proposed testimony." 4 MOORE ¶ 27.14, at 1836.

[95] See note 87 and accompanying text *supra*.

[96] For service by publication on an absent or nonresident defendant, see MISS. CODE ANN. §§ 13-3-19, -27 (1972). For service by publication on an unknown defendant, see *id.* § 13-3-25. *See generally id.* §§ 13-3-1 to -63. There must be strict compliance with the publication statutes. *See* High v. High, 186 So. 2d 196 (Miss. 1966); McCray v. McCray, 137 Miss. 160, 102 So. 174 (1924).

"Otherwise" in the section should give the court some latitude, within all of the requisite constitutional and statutory limitations, to formulate a workable process when personal service and publication are unavailable. In the federal courts, the "otherwise" clause would in some cases permit service by registered mail. 4 MOORE ¶ 27.14, at 1835 n.3.

[97] 4 MOORE ¶ 27.14, at 1836.

[98] In regard to the Advisory Committee, see sections 17 through 20 of the Act, discussed in part XV *infra*.

The legislature should act on the compensation issue before a dispute arises. If it fails to act or decides to leave the matter up to the courts, the supreme court has ample authority to make such a rule in the proper case. *See* Newell v. State, 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975); part XV *A infra*.

[99] *See* 4 MOORE ¶ 27.14, at 1836-37 nn.5 & 6. In the federal courts, *see* De Wagen-

C. Order and Examination

> (c) *Order and examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this act; and the court may make orders of the character provided for by Section 10 of this act. For the purpose of applying Sections 1 through 14 of this act to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

A hearing on the petition is required under section 3(1)(b), but no reference is made to the conduct of the hearing. The court should decide, in a manner similar to the hearing of a motion,[100] whether or not the proposed testimony may be perpetuated, and enter an appropriate order under section 3(1)(c).[101] Section 3 requires no response by an adverse party, and this together with the nature of the hearing and the *verified* petition should indicate the court will not "encumber and delay the proceeding by taking testimony to settle matters of fact alleged in the petition which an expected adverse party may desire to controvert."[102] However, an attack on the facts by affidavit at the hearing, based on petitioner's lack of good faith, would not be precluded.[103] Similarly, any matter in the petition or notice which does not meet the requisite formalities of section 3 may be raised at the hearing. For example, the lack of a "cognizable" matter could be asserted.[104]

After the hearing the court may order the taking of the deposition if it is satisfied the perpetuation of testimony may prevent a failure or delay of justice.[105] The order must designate or describe the person

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knecht v. Stinnes, 250 F.2d 414 (D.C. Cir. 1957); De Wagenknecht v. Stinnes, 243 F.2d 413 (D.C. Cir.), *cert. denied*, 355 U.S. 830 (1957); FED. R. CIV. P. 83.

[100] 4 MOORE ¶ 27.16, at 1839.

[101] *See* 8 WRIGHT & MILLER § 2074, at 341.

[102] 4 MOORE ¶ 27.15, at 1839.

[103] *Id.* ¶ 27.16.

[104] *Id.*

[105] With regard to the federal rules:

> The meaning of "failure of justice" is made more specific by the items [required] to appear on the petition. Thus the court cannot find that there may be a failure or delay of justice where it does not appear that the petitioner is presently unable to bring the expected action or cause it to be brought. But where it is shown that the petitioner is presently unable to bring the expected action or cause it to be brought, there is ordinarily present the danger that the

whose deposition may be taken and must specify the subject matter of the examination. In addition, the order must specify whether the deposition is to be taken upon oral examination or upon written interrogatories attendant with the rules of the respective provisions of the Act.[106] The particular notice requirements of oral depositions or depositions upon written interrogatories may be met by service upon the person representing the expected adverse party at the hearing on the petition, whether privately retained or appointed.[107] A copy of the order should be served with the deposition notice to avoid dispute or confusion over the contents and form of deposition ordered.[108]

In addition to the specific designations the court is required to make with respect to the deposition, the court may make orders for the production of documents and inspection of things under section 10 of the Act.[109] An issue may arise with respect to whether an order for production and inspection under section 10 may be made under section 3 only in conjunction with an order for a deposition. Professor Moore's interpretation of the federal rules indicates orders for production and inspection under section 10 should be available under section 3 regardless of their use in conjunction with a section 3 deposition, except that section 10 should be used only in relation to a person expected to be a party in the prospective litigation since the production rule, in pending litigation, applies only to parties.[110]

All references in the Act to the court in which the action is pending are deemed to refer to the court in which the petition for perpetuation of testimony is filed.

Under the federal rules an order authorizing or denying a deposition to perpetuate testimony is appealable as a final order even if the expected action has been commenced.[111] The state practice regarding appeals will be more confusing, and under the present statutory scheme which bars most interlocutory appeals, the chances of making an appeal are virtually nonexistent.[112] However, considering the nature of the order

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testimony will be lost by reason of the lapse of time. Such danger is sufficient ground for a finding that perpetuation of the testimony may prevent a failure or delay of justice.

Id. at 1840; see notes 80 through 82 and accompanying text *supra*.

[106] Oral examinations are provided for in section 6. See part VI *infra*. Depositions upon written interrogatories are provided for in section 7. See part VII *infra*.

[107] See 4 MOORE ¶ 27.17, at 1842.

[108] *Id.*

[109] See part X *infra*.

[110] 4 MOORE ¶ 27.13, at 1833. A subpoena duces tecum might be appropriate for nonparties. *See* notes 193 & 312 and accompanying text *infra*.

[111] *Id.* ¶ 27.16, at 1840-41; 8 WRIGHT & MILLER § 2072, at 335.

[112] See part XII *D infra*.

under section 3 and the potential for abuse,[113] an order for a deposition for perpetuating testimony takes on the final nature that is required for an appeal. This again is an issue which the legislature and the Advisory Committee should consider.[114]

D. Use of Deposition

> (d) *Use of deposition.* If a deposition to perpetuate testimony is taken under Sections 1 through 14 of this act, it may be used in any action involving the same subject matter subsequently brought in a circuit, chancery or county court in accordance with Section 8 (1).

An expected adverse party must have had notice of the hearing on the petition before an order providing for the deposition to perpetuate testimony can be entered, and he should be served with notice of the ordered depositions under the deposition requirements.[115] If these notice requirements are met, the resulting testimony may be used in subsequent proceedings involving the same subject matter in accordance with section 8(1) of the Act. Section 8(1) provides that depositions in certain situations may be used against any party who was present or represented at the deposition, or who had reasonable notice of its taking.[116] If there is a failure of notice either in regard to the hearing on the petition, or in regard to the deposition itself, the deposition in most cases cannot be used under section 8(1).[117]

E. Pending Appeal

> (2) *Pending appeal.* If an appeal has been taken from a judgment of a court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show (a) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (b) the reasons for perpetuating their testimony. If the court finds that the

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[113] See notes 64 & 65 and accompanying text *supra*.

[114] The Advisory Committee is provided for in sections 17 through 20 of the Act. See part XV *infra*.

[115] See part VI *infra* (depositions upon oral examination); part VII *infra* (depositions upon written questions).

[116] See part VIII *A infra*.

[117] *See* 4 MOORE ¶ 27.18, at 1843.

> perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Section 10, and thereupon the depositions may be taken, and used in the same manner and under the same conditions as are prescribed in this act for depositions taken in actions pending in the court.

This provision is largely self-explanatory, and most of the considerations involved in the procedure under section 3(1) are applicable here. A motion initiates the action, and a finding that the perpetuation is proper to avoid a failure or delay[118] of justice is necessary. The hearing should be conducted in the same manner as a hearing on a posttrial motion.

The most obvious use of this section is a perpetuation of testimony after final judgment on the merits to prevent a failure or delay of justice where there is a danger the testimony will be lost because of the lapse of time between the judgment and any new trial.[119] Another use might be the perpetuation of testimony after a dismissal to preserve the testimony for any eventual trial on the merits.

By the terms of the subsection, the taking of an appeal or the filing of the motion after judgment within the time allowed for appeal should be a prerequisite to an order allowing the deposition. If the motion is granted, depositions may be taken and used in the same manner and under the same conditions provided in sections 6, 7, and 8 of the Act for depositions taken in actions pending in the court.[120] In addition, the court is expressly authorized to make orders for production and inspection under section 10.[121]

F. Perpetuation by Action

> (3) *Perpetuation by action.* This section does not limit the power of a court to entertain an action to perpetuate testimony.

This subsection apparently has reference to the historical equitable action to perpetuate testimony.[122] Mississippi's existing statutory procedure to perpetuate testimony will be repealed by the Act on January 1, 1976.[123]

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[118] See note 105 and accompanying text *supra*.

[119] 4 MOORE ¶ 27.20, at 1847; 8 WRIGHT & MILLER § 2076, at 344.

[120] See part VI *infra* (section 6, depositions upon oral examination); part VII *infra* (section 7, depositions upon written questions); part VIII *infra* (section 8, use of depositions).

[121] *See* notes 109 & 110 and accompanying text *supra*.

[122] For an excellent discussion of equitable perpetuation of testimony, see Westinghouse Mach. Co. v. Electric Storage Battery Co., 170 F. 430 (3d Cir. 1909). *See also* Arizona v. California, 292 U.S. 341 (1934); 4 MOORE ¶ 27.21, at 1849.

[123] The existing statutory procedure is found in MISS. CODE ANN. §§ 13-1-57 to -75

IV. Section 4. Persons Before Whom Depositions May Be Taken

A. Within United States

> (1) *Within the United States.* Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

This section is substantially equivalent to rule 28 of the Federal Rules of Civil Procedure. Depositions, either oral or upon written questions, must be taken either before an officer authorized to administer oaths under the federal statutes or state law, or before a person appointed by the court who is given the power to administer oaths and take testimony.

Officers authorized under the laws of the United States include: United States Justices or judges, federal court clerks and their deputies, and United States commissioners.[124] Additionally, in all cases in which an oath is required by federal law, the oath may be administered by notaries public in any state, district, or territory; by clerks and prothonotaries of courts of record of any state, district, or territory; by deputy clerks and prothonotaries; and by all magistrates authorized to administer oaths by the laws of any such state, district, or territory.[125]

Under Mississippi law the following persons are authorized to administer oaths: judges of any court of record; clerks and court reporters of such court; masters in chancery; members of boards of supervisors; justices of the peace; notaries public; mayors or police justices of a city, town, or village; any officer of any other state or of the United States authorized by the law thereof to administer oaths; the judges of any court of record, or the mayors or chief magistrates of any city, borough, or corporation of a foreign country.[126]

The provision for a court-appointed officer is designed to facilitate the taking of depositions in isolated places and where closely grouped witnesses are on different sides of state lines.[127] An appointment may, of course, be used in any other proper situation. The last sentence of the section "insures that the person appointed shall have adequate power

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(1972). It will be repealed by section 22 of the Act.

[124] *See* 4 Moore ¶ 28.02, at 1915.

[125] *Id.*

[126] Miss. Code Ann. § 11-1-1 (1972).

[127] 4 Moore ¶ ¶ 28.01[4], at 1905, 28.02, at 1913; 8 Wright & Miller § 2082, at 347-48.

to perform his duties."[128] Under rule 28 in the federal courts, a person appointed by the court may take testimony outside the district of his appointment.[129]

Relatively inexpensive notaries public are adequate for most depositions since

> the officer before whom a deposition is taken has no authority to rule on the admissibility of evidence or to compel answers to questions or to impose penalties by contempt or otherwise for a refusal to answer a question.[130]

If a judge is taking a deposition, he may of course rule on such matters. Objections to questions or form that arise in a deposition before an officer other than a judge should be dealt with according to the substantive provisions of the Act regarding depositions.[131]

The requirements of section 4 may be waived under the authority of section 5.[132]

B. In Foreign Countries

> (2) *In foreign countries.* In a foreign country, depositions may be taken (a) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (b) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (c) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the require-

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[128] 4 MOORE ¶¶ 28.01[4], at 1905, 28.02, at 1913.

[129] *Id.* ¶ 28.01[4], at 1905; 8 WRIGHT & MILLER § 2082, at 348.

[130] 4 MOORE ¶ 28.02, at 1915.

[131] See the following sections of the Act: section 3 (depositions to perpetuate testimony); section 6 (depositions upon oral examination); section 7 (depositions upon written questions); section 8 (use of depositions); and section 12 (sanctions upon failure to make discovery). *See* 4 MOORE ¶ 28.02, at 1915.

[132] See part V *infra*.

ments for depositions taken within the United States under Sections 1 through 14 of this act.

Section 4(2) provides three methods by which a deposition may be taken in a foreign country: (a) by notice, (b) by commission, and (c) by letter rogatory. In addition, the parties may stipulate the procedure under the authority of section 5.[133] "Flexibility is provided; and is desirable due to the great divergence of foreign law and the varying circumstances underlying a particular case and surrounding the taking of particular depositions abroad."[134] The first step in all cases where a foreign deposition may be necessary is a consultation with the Department of State in regard to the law and policy of the particular country involved.[135]

Under the notice method a deposition would be taken on notice as in the case of domestic depositions:[136] the party seeking the deposition simply serves notice of the taking of the deposition upon the other party either in the manner provided in section 6 for oral examination,[137] or in the manner for depositions upon written questions under section 7.[138]

Application to the court for an order allowing the deposition is not necessary if the notice procedure is used, and the person seeking the deposition delivers to the person before whom the deposition will be taken a copy of the notice and copies of the written questions, if any.[139] The notice should contain the name or descriptive title of the person before whom the deposition will be taken.

The deposition may be taken before a person authorized to administer oaths in the foreign country, either by that country's law or by the law of the United States. The foreign country's law should be consulted[140] to determine who may administer oaths. Those authorized under United States law include a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.[141] The notice procedure may be used only in countries where it is legally recognized.[142]

If the proposed deponent is a party, sanctions under section 12(4) should be available if he fails to attend. If the proposed deponent is a witness only, the parties must rely on the foreign court applying its law

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[133] *Id.*

[134] 4 MOORE ¶ 28.06[1], at 1936.

[135] 8 WRIGHT & MILLER § 2083, at 348-49.

[136] *See* 4 MOORE ¶ 28.03, at 1922; 8 WRIGHT & MILLER § 2083, at 349.

[137] See part VI *B infra*.

[138] See part VII *C infra*.

[139] 4 MOORE ¶ 28.03, at 1923.

[140] See note 135 and accompanying text *supra*.

[141] *See* 4 MOORE ¶ 28.03, at 1922.

[142] *Id.* at 1923. For example, Swiss law prohibits this procedure. *See id.*

to impose sanctions if, indeed, it recognizes the notice procedure.[143]

The second method under section 4(b) provides that a deposition may be taken before a person commissioned by the court who, by his appointment, is empowered to administer oaths and take testimony. A commission shall be issued on application and notice. There is no preference for the notice method over the commission or letter rogatory, and section 4(2) expressly provides "[i]t is not requisite to the issuance of a commission [that] any other manner is impracticable or inconvenient."[144]

The court has broad discretion in granting commissions and is limited only by any sovereignty consideration of the foreign country;[145] by the practical consideration, when commissioning a diplomatic officer, of consulting the Department of State to determine if the officer will consent to take the deposition; and by choosing a person familiar with the procedure under the Act. The commission will be issued by the court on terms that are just and appropriate.[146] The person commissioned may be designated by name or descriptive title.

The third method provides for taking depositions in foreign countries by a letter rogatory.

> Letters rogatory are formal communications in writing sent by a court in which an action is pending to a court or judge of a foreign country requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action. . . . Compliance with the letters rogatory rests entirely upon the comity of the courts of the two countries toward each other.[147]

No preference exists for a notice proceeding or commission proceeding over a letter rogatory, and a sound choice among the three is permitted by section 4(2).[148] Section 4(2) expressly provides that a letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." It will be issued on application, on notice, and on terms that are just and appropriate.[149] The section expressly authorizes the issuance of both a commission and a letter rogatory in the appropriate case.[150]

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[143] *Id.*; 8 WRIGHT & MILLER § 2083, at 349-50.

[144] *See* 4 MOORE ¶ 28.04, at 1924. "[T]here must be some good reason to deny a party the particular type of judicial assistance he seeks." 8 WRIGHT & MILLER § 2083, at 352; *see* Zassenhaus v. Evening Star Newspaper Co., 404 F.2d 1361 (D.C. Cir. 1968).

[145] *See* 4 MOORE ¶¶ 28.01[6], at 1906, 28.04, at 1925.

[146] *Id.* ¶ 28.04, at 1925-27 & n.17.

[147] 8 WRIGHT & MILLER § 2083, at 350-51; *see* The Singe, 37 F. Supp. 819, 820 (E.D. La. 1941).

[148] *See* 8 WRIGHT & MILLER § 2083, at 352-53; note 144 and accompanying text *supra*.

[149] *See* River Plate Corp. v. Forestal Land, Timber & Ry., 185 F. Supp. 832 (S.D.N.Y. 1960); Verbersee Finanz-Korporation, A.G. v. Brownell, 121 F. Supp. 420 (D.D.C. 1954).

[150] *See* 8 WRIGHT & MILLER § 2083, at 353 n.27.

A letter rogatory would be useful in a non-common law country which prohibits the notice or commission methods, or where the witness is unwilling to appear and it is necessary to rely upon the process of the foreign court.[151] A letter rogatory may be transmitted through the Department of State or may be sent directly to the foreign court.[152]

"As a rule our courts do not allow depositions to be taken of persons in foreign countries for the purpose of getting expert testimony, where there is adequate expert testimony available in this country . . . ."[153] A letter rogatory, however, may be used when adequate expert testimony would not otherwise be available.[154]

After completion of a deposition under a letter rogatory, a question of evidentiary admissibility may arise since a foreign procedure has been used in taking the deposition. Section 4(2) provides the evidence obtained need not be excluded merely because it is not a verbatim transcript, not taken under oath, or for any similar departure from the normal procedure for taking depositions under the Act. For example, a foreign judge may be required to summarize testimony under the law of his country; this alone would not preclude admissibility. "The court has a broad discretion in determining whether or not to admit the testimony in light of the departure, the substance and the probative value of the testimony."[155]

The practicing attorney should be aware that Professor Moore has very adequately summarized in his treatise the entire procedure for taking a deposition in a foreign country.[156]

C. *Disqualification for Interest*

> (3) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Section 4(3) expressly disqualifies certain persons from taking depositions. For example, a notary public who is associated with a party's attorney is not a proper person before whom to take depositions.[157] This

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[151] 4 MOORE ¶ 28.05, at 1931 nn.12 & 13.

[152] *See* 8 WRIGHT & MILLER § 2083, at 351.

[153] 4 MOORE ¶ 28.05, at 1933.

[154] American Infra-Red Radiant Co. v. Lambert Indus., Inc., 32 F.R.D. 372 (D. Minn. 1963); 4 MOORE ¶ 28.05, at 1933; 8 WRIGHT & MILLER § 2083, at 354.

[155] 4 MOORE ¶ 28.05, at 1935; *see* 8 WRIGHT & MILLER § 2083, at 354-55.

[156] 4 MOORE ¶ 28.07, at 1941-43. For a form of a letter rogatory in the federal courts, see *id.* ¶ 28.05, at 1933-34.

[157] Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946); 4 MOORE ¶ 28.10, at 1970; 8 WRIGHT & MILLER § 2084, at 355.

subsection provides the grounds for an objection based on disqualification under section 8(4)(b). Section 8(4)(b) in turn provides that such an objection is waived unless it is made before the taking of the deposition or as soon after it begins as the disqualification becomes known or could be reasonably discovered.[158]

Under section 5 parties may stipulate the person before whom the deposition is to be taken.[159] When a "disqualified" person is the subject of a stipulation, objection under section 8(4)(b) may be waived.[160]

V. Section 5. Stipulations Regarding Discovery Procedures

> *Section 5. Stipulations regarding discovery procedure.* Unless the court orders otherwise, the parties may by written stipulation (a) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (b) modify the procedures provided by Sections 1 through 14 of this act for other methods of discovery, except that stipulations extending the time provided in Sections 9, 10 and 11 for responses to discovery may be made only with the approval of the court.

This section is equivalent to rule 29 of the Federal Rules of Civil Procedure. It is designed for the convenience of the parties and witnesses and for saving time and expense by a stipulation changing the usual procedures.[161]

In regard to depositions the parties may stipulate *in writing* the person before whom a deposition is to be taken, and the time, place, notice, or manner in which it is to be taken. A stipulation has no effect on the use of the deposition. For example, the parties might stipulate to the use of office stenographers rather than an official reporter to save money.[162] If the person is not disqualified for interest under section 4(3),[163] a stipulation of this sort would apparently be acceptable. A stipulation that a deposition be taken before a stenographer whose fees would be taxed as costs has been allowed.[164]

The court has control over stipulations relating to depositions, but advance approval should not ordinarily be required.[165] The court may

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[158] See part VIII *D infra*.

[159] See part V *infra*.

[160] 8 Wright & Miller § 2084, at 355.

[161] *Id.* § 2091, at 357.

[162] *Id.* § 2084, at 356; *see* 4 Moore ¶¶ 28.10, at 1970, 29.02, at 29-3 to -4. *See generally* Marlboro Prod. Corp. v. North Am. Philips Corp., 55 F.R.D. 487 (S.D.N.Y. 1972).

[163] See notes 158 through 160 and accompanying text *supra*.

[164] Liebert v. Netherlands Am. Steam Navigation Co., 2 F.R.D. 316 (S.D.N.Y. 1942).

[165] 8 Wright & Miller § 2092, at 359.

supersede the stipulations by order.[166] In the absence of a written stipulation, depositions must be taken in accordance with the Act.[167]

All other methods of discovery under the Act are also subject to stipulation unless the court orders otherwise. However, with respect to stipulations extending the time for responses to interrogatories under section 9,[168] responses to requests for production and inspection under section 10,[169] and responses to requests for admissions under section 11,[170] there must be court *approval* before the stipulation is effected.[171]

In general, section 5 should relate "only to stipulations affecting discovery procedure and not to the circumstances under which discovery may be had or to the use at the trial of any material discovered."[172] General stipulations to the taking of depositions should not be deemed to waive objections to the competency and materiality of the testimony.[173]

VI. Section 6. Depositions on Oral Examination

A. When Deposition May Be Taken

> (1) *When depositions may be taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty (30) days after service of the summons upon any defendant, except that leave is not required (a) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (b) if special notice is given under subsection (2) (b) of this section. The attendance of witnesses may be compelled by subpoena. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

The most important of all the discovery devices is the oral deposition. In federal court and in most state courts this device is used more than any other method of discovery even though it is by far the most expensive. The deposition is the only significant discovery device which can be directed against any person.[174] It is the only discovery device

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[166] *Id.*

[167] *See id.* § 2091, at 357.

[168] See part IX *infra*.

[169] See part X *infra*.

[170] See part XI *infra*.

[171] *See* 4A Moore ¶ 29.02, at 29-5; 8 Wright & Miller § 2092, at 359-60.

[172] 4A Moore ¶ 29.02, at 29-4.

[173] *Id.*

[174] C. Wright, Law of Federal Courts § 84, at 373 (2d ed. 1970) [hereinafter cited as Wright].

which allows spontaneous responses from a live witness on direct and cross-examination.

Any party can depose any person, including himself, other parties, dismissed parties, employees of parties, and potential witnesses.[175] The attendance of witnesses at a deposition can be compelled by subpoena. This section does not require the issuance of subpoenas, and although not specifically expressed, subpoenas are unnecessary to compel the attendance of parties[176] since section 12(4) provides for the imposition of sanctions if a party fails to appear at his deposition of which he has proper notice.[177] Subpoenas should, however, be issued to compel the attendance of mere employees of a party since no sanctions can be imposed upon a party for failing to compel the appearance of a mere employee.[178]

Ordinarily leave of court to take a deposition is not necessary. Proper notice to all parties and the deponent is all that is required. However, if the plaintiff desires to take a deposition prior to the expiration of 30 days after service of process on all defendants, leave of court *is* required. This provision ensures that defendants have time to retain counsel and are given a reasonable opportunity to prepare for and appear at depositions.[179] There are two exceptions to the requirement of leave of court: (1) Where a defendant commences discovery within 30 days after process has been completed; and (2) where special notice is given under section 6(2)(b). This special notice provision is appropriate only where the witness will be unavailable in 30 days.[180]

Usually, to obtain leave of court to depose a witness within 30 days of service of process, a party must show unusual circumstances or conditions exist which will be likely to prejudice the party if he is compelled to wait the required time.[181] Many times the reason for early depositions will be that the party believes the witness will not be available in 30 days. Therefore, the special notice provision of section 6(2)(b) should cover most of the "unusual circumstances," and this section, together with most of the other provisions of the Act, should operate extrajudicially.[182]

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[175] 8 WRIGHT & MILLER § 2102, at 367-69.

[176] 4A MOORE ¶ 30.55, at 30-67; 8 WRIGHT & MILLER § 2107, at 391.

[177] Section 12(4).

[178] 4A MOORE ¶ 30.55, at 30-67. A corporate party does have the responsibility to produce its officer, director, or managing agent as provided in section 6(2)(f) without the necessity of a subpoena. 8 WRIGHT & MILLER § 2107, at 391.

[179] 8 WRIGHT & MILLER § 2104, at 383.

[180] See note 189 and accompanying text *infra*.

[181] 4A MOORE ¶ 30.54, at 30-65; 8 WRIGHT & MILLER § 2104, at 384.

[182] 8 WRIGHT & MILLER § 2104, at 384-85.

B. Notice, Recording, Production of Documents, Organizations

(2) *Notice of examination: general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization.* (a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. Reasonable notice shall mean at least five (5) days in advance of the proposed examination. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) Leave of court is not required for the taking of a deposition by plaintiff if the notice (i) states that the person to be examined is about to go out of the state and will be unavailable for examination unless his deposition is taken before expiration of the thirty-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subsection (2) (b) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(c) The court may for cause shown enlarge or shorten the time for taking the deposition.

(d) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

(e) The notice to a party deponent may be accompanied by a request made in compliance with Section 10 of this act for the production of documents and tangible things at the taking of the deposition. The procedure of Section 10 of this act shall apply to the request.

(f) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to

> make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (2) (f) does not preclude taking a deposition by any other procedure authorized in Sections 1 through 14 of this act.

The requirements of proper notice of the taking of depositions are set out specifically in this section. The basic requirements are simple: (1) Time of deposition; (2) place of deposition; (3) names and addresses of deponents. The notice must be in writing, and informal notice is insufficient. A single notice may cover more than one witness.[183] Copies of the notice should be served upon counsel for each party.[184] Parties must be given at least 5-days notice[185] of the taking of a deposition; however, the court may permit a deposition to be taken on less than 5-days notice "for cause shown."[186]

The location of the examination is important because of the expense involved. Ordinarily the examining party can select the location subject to the court's discretion and power to designate a different place. The court likewise has the discretion to impose conditions on the payment of expenses.[187]

Notice does not need to contain the name of the court reporter. However, if known, it is advisable to name the court reporter in the notice along with the phrase "or before some other officer authorized by law to take depositions."[188]

Section 6(2)(b) provides for special notice of a deposition by the plaintiff within 30 days of service of process without leave of court. In order for the special notice section to be invoked the attorney must certify and give supporting facts to show the witness is about to leave the state and will be unavailable for examination.[189] If, when a deposition is taken under section 6(2)(b), a party can show the deposition was taken before he was able to obtain counsel, the deposition cannot be used against him.

Where the name of the witness is unknown section 6(2)(a) requires

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[183] *Id.* § 2106, at 387-89.

[184] The method of service is governed by section 13 which provides that where a party is represented by counsel, service is made by delivering or mailing a copy of the notice to the attorney for the party. Where the party is not represented by counsel, service of the notice is made in the same manner as service of subpoenas on witnesses. See part XIII *infra*.

[185] Section 6(2)(a) of the Act defines reasonable notice as "at least 5 days." The Federal Rules of Civil Procedure do not define "reasonable notice." *See* FED. R. CIV. P. 30(b)(1).

[186] Section 6(2)(c).

[187] 8 WRIGHT & MILLER § 2112, at 403, 405 & 411.

[188] 4A MOORE ¶ 30.57, at 30-85, *quoting from* Sweifler v. Sleco-Laces, 11 F.R.D. 202 (S.D.N.Y. 1950).

[189] See notes 181 & 182 and accompanying text *supra*.

that the notice contain a general description sufficient to identify the witness. This provision has primarily two purposes. First, if the witness is not a party, the description will advise the adversary who will testify and enable the adversary to prepare cross-examination. Second, in the case of a corporate deponent, the description will inform the corporation whom it must produce.[190]

When the deponent is a corporation section 6(2)(f) provides a very useful alternative to the notice to unknown witness provision of section 6(2)(a). Under section 6(2)(f) a party can designate matters upon which examination of a corporation is requested. The corporation then has the duty to designate officers, directors, managing agents, or other persons who can and will testify to everything related to the designated matter which is reasonably available to the corporation.[191] With regard to this provision, it must be remembered if the designee of the corporation is not an officer, director, or managing agent, a subpoena must be issued to ensure his attendance at the deposition.[192]

Any corporation, whether a party or not, can be compelled under section 6(2)(f) to designate a person to testify on behalf of the corporation on certain matters. If the corporation is not a party, it must be advised in the subpoena of its duty to make the designation.

The production of documents and things under section 10 can be compelled at a section 6 deposition. This procedure is found in subsections 6(2)(a) and (e) of the Act. If the deponent who has the documents is a party, then the procedure for production under section 10 of the Act must be followed. In order to comply with section 10, it is sufficient that the notice contain a description of the documents and a request for their production. The party served with a notice containing such a request has 30 days under section 10 to file a written response. Production of documents by a nonparty can be compelled by subpoena duces tecum.[193] Through the subpoena duces tecum a party can require the nonparty deponent to produce documents and things simultaneously with the scheduled deposition when there has been proper notice. The nonparty deponent must provide the subpoenaed documents at the time his deposition is taken. A deposition, as pointed out earlier, can be scheduled on as little as 5-days' notice. One treatise describes the unusual situation created by this provision and offers the following suggestions in construction:

> It makes no sense at all to build such a long delay into the procedure as against a party while allowing expeditious proceedings against a

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[190] 4A MOORE ¶ 30.57[8], at 30-86.

[191] *Id.* ¶ 30.57[13], at 30-100; 8 WRIGHT & MILLER § 2110, at 400.

[192] See note 178 and accompanying text *supra*.

[193] MISS. CODE ANN. § 11-1-51 (Supp. 1974).

> nonparty. The only way to avoid such an unappealing result is to say that the procedural provisions of [section 10] other than the time periods there set out apply to a request under [section 6(2)(e)], that the later request requires only "reasonable" notice, and that if the party from whom discovery is sought does not wish to allow inspection and copying he must object prior to the date set for the deposition.[194]

The testimony taken at depositions does not need to be stenographically recorded. The court can designate other means of recording, preserving, and filing the testimony. If another method is designated, the section does allow any party to have a stenographic transcript made at his own expense.

C. Examination and Objections

> (3) *Examination and cross-examination; record of examination; oath; objections.* Examination and cross-examination of witnesses may proceed as permitted at trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (2)(d) of this section. If requested by one of the parties, the testimony shall be transcribed.
>
> All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

The examination of witnesses proceeds just as at trial. The witness must be placed under oath by the officer (court reporter). A party may cross-examine an adverse party; an officer, director, or managing agent of a corporation or association which is an adverse party; or an unwilling or hostile witness.[195]

A party may be examined on direct by his counsel after cross-examination by the adversary. Such an examination is usually advisable to clarify answers given on cross-examination. Although changes in form and substance can be made at the time the deposition is signed,[196] it is

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[194] 8 WRIGHT & MILLER § 2108, at 395-96.

[195] *Id.* § 2113, at 419.

[196] Section 6(5). See notes 207 & 208 and accompanying text *infra*.

usually more desirable to accomplish clarification of the party's testimony immediately after the cross-examination by the adversary.[197]

All objections to the deposition proceeding and objections made during the course of examination must be noted by the court reporter. Evidence objected to must be taken by the court reporter subject to the objection. Some objections must be made at the time the deposition is taken or they are considered waived. For example, a party must object to errors that could have been obviated, removed, or cured if objection had been promptly made at the deposition. Thus, a party may waive objections of the deposition proceeding, form of questions, or other technical errors made at the deposition. Objections to relevancy, competency, and materiality, however, are not waived and may be made at trial even though they were not made at the deposition.[198] The record of the testimony will be transcribed upon request of one of the parties.[199]

If a witness refuses to answer a question to which an objection is made, the party asking the question can either adjourn the examination in order to make an immediate motion to compel an answer under section 12(1), or he may complete the examination before making his motion under section 12(1). The court may award the prevailing party its attorney's fees and expenses on a motion to compel discovery under section 12(1) unless the court finds there was "substantial justification" for the refusal to answer and the making of the motion. Thus, the better practice is for the attorney to note the objection and permit the party to testify "leaving the resolution of the objection to pre-trial or trial."[200]

Instead of personally appearing at an oral deposition, a party can submit sealed written questions to the party taking the deposition. That party must then transmit the sealed questions to the court reporter and instruct the court reporter to ask the questions of the witness and record the answers. This procedure may often prove convenient and save considerable expense, especially for a party seeking only specific information from the witness.[201]

D. Motion to Terminate or Limit

(4) *Motion to terminate or limit examination.* At any time during

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[197] 4A MOORE ¶ 30.58, at 30-105.

[198] Section 8(4). *See also* 8 WRIGHT & MILLER § 2113, at 420.

[199] Presumably the party who requests that the record be transcribed must bear the cost of the original. This should be true even though the request is made by a party other than the party who initiated the deposition. 4A MOORE ¶ 30.59, at 30-107. Also, under the Mississippi Act the costs of a deposition cannot be taxed as court costs. Section 14.

[200] Drew v. International Bhd. of Sulphite & Paper Mill Workers, 37 F.R.D. 446, 449 (D.D.C. 1965).

[201] 8 WRIGHT & MILLER § 2113, at 421.

> the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition or may limit the scope and manner of the taking of the deposition as provided in Section 2(3). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Section 12 (1) (d) applies to the award of expenses incurred in relation to the motion.

Witnesses and parties are protected from harassment, embarrassment, annoyance, and bad faith examinations by section 6(4). Where a bad faith examination is taking place, the court in which the action is pending, on motion of a party or deponent, may order the court reporter to cease taking the deposition. The deposition must be suspended while the motion is made. In granting or denying the motion the court shall award attorney's fees and expenses to the prevailing party unless the losing party had "substantial justification."[202] If the examination is terminated, it can be resumed only upon the order of the court in which the action is pending. The court can also issue a protective order under section 2(3) to limit the scope of the examination.

In order to be given relief under section 6(4), the party or deponent must make a sufficient showing of bad faith or unreasonableness of the examination.[203] Insistent questioning about privileged matters,[204] going too far afield,[205] and persistent improper attempts to pry into trial preparation[206] have been held sufficient to justify a protective order.

E. Submission to Witness

> (5) *Submission to witness; changes; signing.* When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given

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[202] Section 12(1)(d).

[203] *See, e.g.*, Paiewonsky v. Paiewonsky, 50 F.R.D. 379, 380 (D.V.I. 1970) (examination not unreasonable or in bad faith); 8 WRIGHT & MILLER § 2116, at 428.

[204] Magida v. Continental Can Co., 12 F.R.D. 74, 77 (S.D.N.Y. 1951).

[205] Macrina v. Smith, 18 F.R.D. 254, 257 (E.D. Pa. 1955).

[206] Schweinert v. Insurance Co. of North America, 1 F.R.D. 247, 248 (S.D.N.Y. 1940).

by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within thirty (30) days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign, together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Section 8 (4) (d) of this act the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

After the transcript is prepared, the court reporter must submit the transcript to the witness for reading and signing. After the witness has reviewed his testimony, he must be allowed to make whatever changes he desires. Both the original and the changed testimony should appear in the record along with the witness' reasons for changing his testimony. The changes the witness makes may render the testimony incomplete, and the parties may need to examine the witness further in light of his new answers.[207]

After the changes are made, the deposition must be signed by the witness unless, by stipulation, the signing is waived. If the witness does not sign within 30 days after the deposition is submitted to him, the court reporter must sign it and state in the deposition the reason for the witness' failure or refusal to sign. A deposition signed by the court reporter is valid and may be used as though signed by the witness unless, of course, the witness' reason for refusing to sign entitles him to suppress the deposition.[208]

F. Certification and Filing

(6) *Certification and filing by officer; exhibits; copies; notice of filing.* (a) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (i) the person

[207] De Seversky v. Republic Aviation Corp., 2 F.R.D. 113, 115 (S.D.N.Y. 1941).
[208] 8 WRIGHT & MILLER § 2118, at 437.

producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(b) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(c) The party taking the deposition shall give prompt notice of its filing to all other parties.

The court reporter must file the deposition with the court and give prompt notice of filing. Documents produced at a deposition must be marked for identification and returned with the deposition. The person producing the documents can substitute copies, and the reporter should give all parties the opportunity to verify the copies. Any party can move the court to order the original documents annexed to the deposition until the case is concluded. Each party and the deponent is entitled to buy a copy of the deposition.

G. Failure to Attend or Serve Subpoena

(7) *Failure to attend or to serve subpoena; expenses.* (a) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(b) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

When a party gives notice of a deposition and fails to appear, and if the adverse party *does* appear, the court may order the absent party to pay the attorney's fees and expenses of the other party. The court may make a similar order if a deposition is not taken because the party who gave notice of the deposition failed to subpoena the witness. The purpose of this provision is to place the cost of depositions aborted for these two reasons where it belongs—with the party responsible.

VII. Section 7. Depositions Upon Written Questions

(1) *Serving questions; notice.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (a) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (b) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with Section 6 (2) (f) of this act.

Within thirty (30) days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten (10) days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten (10) days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(2) *Officer to take responses and prepare record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Section 6 (3), (5) and (6) of this act, to take the testimony of the witness in response to the questions and to prepare, certify and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(3) *Notice of filing.* When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Section 7 provides the machinery for taking depositions of parties and witnesses upon written questions. This method of discovery is usually far less satisfactory than the direct confrontation of the witness or party in a deposition upon oral examination. However, where the witness is friendly and where the testimony sought relates specific facts rather than conclusive generalities, a deposition upon written questions should produce satisfactory results.[209] This discovery device is usually less expensive than depositions upon oral examination, and in addition, this is the only procedure for taking the testimony of a nonparty witness other than oral depositions.

The notice of a deposition upon written questions must contain the

[209] 4A Moore ¶ 31.02, at 31-7 to -8.

questions to be asked. The notice must be served on each party and must include the name, address, and descriptive title of the officer before whom the deposition will be taken. The notice should contain the same information as a notice of an oral deposition.

Within 30 days after service of the notice the other parties may propound cross-questions. Ten days each are allowed for propounding redirect and recross questions. Objections to the form of written questions are waived unless made in writing within the time permitted for responsive questions or within 5 days of filing recross questions.[210]

The party taking the deposition is responsible for forwarding all questions and cross-questions to the court reporter taking the deposition. The questions are propounded by the court reporter, and the responses are taken verbatim. The reporter must transcribe the deposition, file it with the court, and give prompt notice of filing.

There are two serious limitations in the use of depositions upon written questions. First, too often the questions are made available to the witness before questioning. It is an improper practice for counsel to divulge the questions to the witness, even if the witness is his client and a party to the suit.[211] Secondly, many attorneys avoid this procedure because it is extremely difficult to frame recross or redirect questions when answers to earlier questions are unknown.[212]

VIII. Section 8. Use of Depositions in Court Proceedings

A. Use of Depositions

(1) *Use of depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any

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[210] Section 8(4)(c)(iii).

[211] 4A Moore ¶ 31.02, at 31-8 to -9.

> If they [depositions on written questions] are to be an adequate substitute for oral depositions, the maximum spontaneity of the answers should be preserved and the questions should not be provided to the deponent in advance of the examination. Realistically, however, it may be chimerical to suppose that when the deponent is a party and the questions are served on his counsel, the latter will not prepare his client with an eye to the questions he knows will be asked, even if he does not provide him with the questions in haec verba.

Id. at 31-8.

[212] 8 Wright & Miller § 2132, at 444. One case suggests, also, that attorneys have been allowed to file additional cross-interrogatories after answers to direct and cross-interrogatories became available. There was also an indirect indication that, in exceptional circumstances, the court will allow cross-interrogatories to be first filed after answers to direct interrogatories are submitted. *See* Baron v. Leo Feist, Inc., 7 F.R.D. 71 (S.D.N.Y. 1941).

party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(b) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent, or a person designated under Sections 6 (2) (f) or 7 (1) of this act to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

Although the taking of depositions and the discovery of facts during depositions is virtually unrestricted, the use of depositions at trial is another matter. United States District Court Chief Judge William C. Keady made the following statement about the use of depositions at the 1975 Mississippi State Bar Convention:

> [Y]ou can take a statement virtually without restriction, but that does not mean you can introduce that statement or that deposition into evidence. You must comply with the rules of evidence regarding admissibility. Attorneys will have to learn that it is one thing to take a discovery deposition, it is another thing to get it introduced into evidence. It must qualify under one of the grounds for admission.[213]

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[213] Remarks of Chief Judge William C. Keady of the United States District Court for

Thus, when depositions are sought to be used at trial or on motions or in interlocutory proceedings, the Mississippi rules of evidence apply as though the deponent was giving live testimony.

The use of depositions at trial is further restricted by section 8(1) which specifically recognizes that it is less desirable to take testimony by deposition than by live witnesses. Generally, only when a witness is unavailable at trial should a deposition be substituted for live testimony, because deposition testimony is usually hearsay evidence. Section 8(1) "creates of its own force an exception to the hearsay rule."[214]

Under section 8(1) depositions can be used in these circumstances and for these purposes: (a) If a deponent is offered as a witness at trial, his deposition can be used to impeach and contradict his testimony at trial; (b) the deposition of an adverse party can be used for any purpose; it can be submitted as independent original evidence by any party whose interests are adverse to the party deponent even though they might be nominal coparties.[215] Depositions of individuals who, at the time of the deposition, are officers, directors, or managing agents of a corporate party are available to adverse parties for all purposes, as are depositions of persons designated by a corporate party to testify about certain matters under section 6(2)(f). Depositions of people who were officers, directors, or managing agents at one time, but are not so engaged at the time of the deposition,[216] and depositions of mere employees of a corporate party not designated under section 6(2)(f), may be used only for impeachment.[217] Determining who is a managing agent and who is a mere employee is important because the deposition of a managing agent can be used for all purposes while an employee must be designated under section 6(2)(f) before his deposition is available to adversaries for all purposes.[218] "Managing agent" was defined in the case of *Krauss v. Erie R.R.*:[219]

> A managing agent, as distinguished from one who is merely "an employee" is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporate matters; he does not act "in an inferior capacity" under close supervision or direction of "superior authority." He must be a person who has "the interests of the corporation so close to his heart that he could be de-

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the Northern District of Mississippi, made at the General Assembly of the Mississippi State Bar Convention, June 2, 1975, at 95 [hereinafter cited as Remarks].

[214] 8 WRIGHT & MILLER § 2143, at 452-53.

[215] 4A MOORE ¶ 32.04, at 32-17.

[216] *Id.* at 32-18.

[217] 8 WRIGHT & MILLER § 2145, at 456.

[218] 4A MOORE ¶ 32.04, at 32-17 to -22.

[219] 16 F.R.D. 126 (S.D.N.Y. 1954).

> pended upon to carry out his employer's direction to give testimony at the demand of a party engaged in litigation with the employer."[220]

(c) The deposition of any witness may be used for any purpose if: (1) the witness is dead; (2) the witness is more than 100 miles from the trial or out of state unless the party offering the deposition caused the absence; (3) the witness is too old or sick to attend the proceeding or is in prison and unable to attend; (4) the party offering the deposition cannot procure attendance of the witness by subpoena; (5) exceptional circumstances exist which outweigh the importance of live testimony.

The first four conditions require no explanation—except in regard to the first, if the witness dies during the deposition and before cross-examination the court would have the discretion to refuse use of the deposition at trial.[221] The fifth condition was designed to provide flexibility and to allow for unanticipated situations where, although none of the first four conditions are met, justice requires a party be permitted to use a deposition at trial.[222] The provision does, however, give a stern warning against the trial of cases generally upon depositions and stresses the importance of live testimony.

Under the express terms of the Act, section 8(1)(c) applies to a party's use of his own deposition. If the conditions of subsections 8(1)(c)(i), (iii) and (v) are met, a party should be allowed to use his own deposition. Since a party does not need to subpoena himself, subsection (iv) is inapplicable. Problems of construction in the federal system have arisen with respect to subsection (ii) which permits the general use of a deposition where the witness (party) is more than 100 miles from the trial or is out of the state. The problem arises because subsection (ii) excludes use of the deposition where the absence of the witness is procurred by the party who wants to use the deposition.[223] Does an absent party *procure* his own absence? The best federal authority interprets the rule as applying equally to parties, thus enabling a party to use his deposition if he resides out-of-state or more than 100 miles from trial.[224]

A party who uses a deposition for impeachment or for independent original evidence is not required by the provision to introduce the entire deposition. Judge Keady explained the proper way to introduce a deposition:

> The use of depositions at trial is important. The good practitioner will always give the witness on the stand—usually [it is] used for

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[220] *Id.* at 127.

[221] Waterman S.S. Corp. v. Gay Cottons, 414 F.2d 724, 727-28 (9th Cir. 1969).

[222] 4A MOORE ¶ 32.05, at 32-27 & n.9.

[223] 8 WRIGHT & MILLER § 2147, at 462-63.

[224] Richmond v. Brooks, 227 F.2d 490, 492-93 (2d Cir. 1955); 8 WRIGHT & MILLER § 2147, at 463.

> impeachment—the deposition, let him see what he said while he puts the questions to him. Then, to follow it up, that part of the deposition should be offered, should be marked as an exhibit and offered [—n]ot the whole deposition, of course, the depositions of parties are admissible for any purpose, but nevertheless, it does not serve any worthwhile purpose to introduce the whole deposition of a party if it is lengthy . . . and his testimony does not substantially vary from what he said in the deposition. From the trial judge's standpoint, there can be a lot of unnecessary depositions . . . offered.[225]

After part of a deposition has been offered, section 8(1)(d) provides that the adverse party can require other parts of the deposition to be introduced if they should, in fairness, be considered with the part already introduced. The reason for this provision is to avoid "misimpressions from selective reading of deposition testimony."[226] Accordingly, the provision requires

> that the opposing party should be able to require the introduction of the relevant parts of the deposition testimony at least at the conclusion of the reading of the deposition . . . . [W]ide separation of the relevant parts of a deposition unduly impedes the orderly consideration of the deposition testimony, even in a non-jury case.[227]

Section 8(1)(d) specifically provides that after a part of any deposition has been introduced any party can introduce any other part of the deposition subject only to the rules of evidence.

If a party dies or becomes incompetent and the action is continued by or against his representative, or if there is a transfer of interest and the court directs that the person to whom the interest was transferred be substituted for the original party, depositions taken prior to the substitution can be used in the trial. For example, a defendant may use the deposition of the original plaintiff as evidence of admissions against the substituted plaintiff. In addition, the substituted party can use the depositions previously taken in the same manner as the original party.[228]

If an action is dismissed and a subsequent action is brought involving the same subject matter between the same parties or their representatives or successors, section 8(1)(d) provides that depositions taken and filed in the former action can be used as if taken in the later case.[229] The federal courts' liberal construction of this provision has led to a much wider use of depositions taken in prior actions than the language of the

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[225] Remarks, *supra* note 213, at 95, 96.

[226] Westinghouse Elec. Corp. v. Wray Equip. Corp., 286 F.2d 491, 494 (1st Cir. 1961).

[227] *Id.*

[228] 4A MOORE ¶ 32.07, at 32-35.

[229] *Id.* ¶ 32.08, at 32-37.

rule appears to allow.[230] The federal courts have permitted the use of depositions in actions involving different parties and differences in subject matter where there is a "substantial identity of issues."[231] The federal courts have recognized that testimony taken by deposition in former actions should be allowed where "the former testimony was given upon such an issue that a party-opponent in that case had the same interest and motive in his cross-examination that the present opponent now has."[232]

Of course, the use and admissibility of depositions in a previous action is subject to all of the provisions of section 8 in the same manner as original depositions.

B. *Objections to Admissibility*

> (2) *Objections to admissibility.* Subject to the provisions of Section 4 (2) of this act and subsection (4) (c) of this section, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Objections to the admissibility of all or any part of a deposition may be made at trial "unless the ground of the objection is one that might have been obviated or removed if made when the deposition was being taken."[233] Therefore, if a party has an objection to the use of deposition testimony either because the conditions of section 8(1) were not met, or because the evidence is inadmissible under the Mississippi rules of evidence, he must make the objection when the deposition is offered into evidence as if the witness were present and testifying.

C. *Effect of Taking or Using Deposition*

> (3) *Effect of taking or using depositions.* A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any

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[230] 8 WRIGHT & MILLER § 2150, at 467. For example, although the provision requires that the former action be dismissed before the depositions taken there can be used anywhere else, the courts have not enforced that requirement. In the case of Batelli v. Kagan & Gaines Co., 236 F.2d 167 (9th Cir. 1956), the court said that "[s]uch a restrictive construction ignores the purposes of the Federal Rules of Civil Procedure . . . ." *Id.* at 169.

[231] 8 WRIGHT & MILLER § 2150, at 468 & n.86.

[232] *Id.* at 469. *See, e.g.*, Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502, 504 (10th Cir. 1949).

[233] 8 WRIGHT & MILLER § 2151, at 471. Technical objections to the proceedings, to the form of questions, to the form of expert testimony, and objections based on privilege must be made at the time the deposition is taken. See note 198 and accompanying text *supra*.

purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition under subsection (1) (b) of this section. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

A party incurs no obligation with respect to a particular witness merely by taking the witness' deposition prior to trial. The witness at a deposition does not become the witness of the party at whose insistence the deposition is taken. If the witness testifies for the other party at trial, the party who took his deposition may impeach and contradict the testimony of the witness.

If a party introduces a deposition into evidence for purposes other than impeachment or contradiction, however, the deponent becomes that party's witness. The obvious exceptions are depositions of adverse parties and designees of adverse corporate parties under sections 6(2)(f) and 7(1) since a party certainly cannot guarantee the credibility of an adverse party when introducing his deposition as evidence of admissions.[234]

D. Effect of Errors and Irregularities

(4) *Effect of errors and irregularities in depositions.* (a) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) *As to taking of deposition.* (i) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. (ii) Errors and irregularities occuring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. (iii) Objections to the form of written questions submitted under Section 7 of this act are waived unless served in writing upon the party propounding them within the time allowed for

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[234] 4A MOORE ¶ 32.10, at 32-45.

serving the succeeding cross or other questions and within five (5) days after service of the last questions authorized.

(d) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Sections 6 and 7 of this act are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Generally, section 8(4) requires objections based on errors and irregularities in the taking of depositions to be made promptly on penalty of waiver. Its purpose is to give a party the opportunity to correct his mistakes and thus prevent the waste of time and money incident to a motion to suppress a deposition based on past technical errors. Even when objections are seasonably made under this section, they must be substantial and must affect the value of the deposition as evidence before the error will preclude the use of the deposition at trial.[235]

Subsection 8(4)(c)(i) seems to be an exception to the general function of section 8(4). It provides that objections based on competency, relevancy, and materiality are not waived by failure to object during the depositions. Close scrutiny, however, reveals its purpose is entirely consistent with the other parts of the section. Subsection 8(4)(c)(i) merely avoids burdening the record with numerous objections that cannot be resolved until the deposition is offered into evidence at trial.[236]

E. Depositions Under Existing State Law

The present state law, which will be repealed by the new Act, permits the taking of depositions only in certain limited circumstances delineated by statute.[237] First, depositions of all nonresident witnesses may be taken.[238] The procedure is cumbersome and resembles the new procedure for depositions upon written questions discussed above. The party desiring to take the deposition of a nonresident must first file interrogatories with the clerk.[239] Other parties can file cross-interrogatories within 10 days.[240] The clerk then issues a commission to

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[235] 8 WRIGHT & MILLER § 2153, at 475. *See also* 4A MOORE ¶ 32.11, at 32-47.

[236] 8 WRIGHT & MILLER § 2153, at 475.

[237] MISS. CODE ANN. §§ 13-1-27 to -51, -55 to -75 (1972), repealed by section 22.

[238] MISS. CODE ANN. § 13-1-35 (1972). For a general discussion and criticism of the present deposition statute, see Everette, *Motions and Discovery Procedures*, in CIRCUIT COURT PRACTICE 97, 114-17 (Mississippi Law Institute 1966); Patterson & Patterson, *A Plea for Procedural Reform in Mississippi*, 42 MISS. L.J. 293, 304-07 (1971).

[239] MISS. CODE ANN. § 13-1-35 (1972).

[240] *Id.*

an officer qualified to take the deposition in the foreign jurisdiction.[241] The interrogatories are sent to the officer who examines the witness using the interrogatories.[242] The adverse party may attend the deposition and cross-examine the witness,[243] and if he does, the party taking the deposition can attend for examination in rebuttal.[244]

Oral depositions may be taken from certain witnesses who reside in the state.[245] The statute restricts the use of oral depositions to the following situations involving resident witnesses:

> (1) When the witness is about to leave the state or when it is unlikely that the witness will be able to testify because of age, sickness or other causes;
> (2) When the claim or defense depends entirely upon one witness;
> (3) When the witness is a judge or other government official who cannot conveniently attend trial;
> (4) Where a clerk, sheriff or justice of the peace shall be required to testify outside his county;
> (5) Females;
> (6) Where the witness lives more than 60 miles from the place of trial;
> (7) Physicians.[246]

Depositions of these witnesses are permitted by statute after suit is filed and summons served.[247]

The party desiring to take the deposition of either a resident or nonresident witness must file an affidavit stating that the witness is material and giving the reason for taking the deposition.[248] Any opposing party can prevent the admission of the deposition into evidence if, within 10 days before trial, the party files an affidavit stating that, in his opinion, the witness should be examined in open court.[249] The admission of the deposition will not be permitted in that event unless it can be shown the witness is dead or "unable to attend court on account of disability from permanent sickness, physical injury, or from weakness and disability incident to old age . . . ."[250]

There is no question that depositions under our present state procedure are intended not for discovery, but solely to permit the gathering

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[241] *Id.*; *id.* § 13-1-37.
[242] *Id.* § 13-1-35.
[243] *Id.*
[244] *Id.*
[245] *Id.* § 13-1-27.
[246] *Id.*
[247] *Id.*
[248] *Id.* § 13-1-31.
[249] *Id.* § 13-1-55.
[250] *Id.*

and preserving of evidence for trial.[251] The present practice does not permit "discovery" as contemplated in the new Act. The new discovery provisions seek information. In general, the only requirement under the new provisions is that the information sought is relevant to the subject matter and "appears reasonably calculated to lead to the discovery of admissible evidence."[252] Under the old procedure the parties had to look to the pleadings for their exchange of information. In this regard, the old deposition statute is symptomatic of outmoded common law attitudes toward discovery. For example, under the old statute, rather than deposing a witness in the hope of discovering admissible evidence, the party seeking to take the deposition must swear, prior to the time the deposition is taken, the information he is seeking is material.

The procedural differences between the new provisions and the old statute are no less drastic or irreconcilable. The new provisions conceive depositions to be the primary discovery device, while the restrictions upon the use of depositions under the old procedure rendered discovery by deposition unavailable in most cases. Except for federal practice, Mississippi practitioners have had little or no experience with the use of depositions as a discovery device. Therefore, a conscientious effort toward education must be made both by individual attorneys and through continuing legal education programs[253] to ensure that litigants in our courts are given the full benefit of the new discovery provisions.

IX. Section 9. Interrogatories to Parties

A. Availability and Procedures for Use

(1) *Availability; procedures for use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff or complainant after commencement of the action and upon any other party with or after service of the summons upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have

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[251] Everette, *supra* note 238, at 116.

[252] Section 2(2). See part II *B supra*.

[253] One such program has already been scheduled for 1975. The Mississippi Law Institute will focus on the new discovery provisions in its meeting in Jackson in December 1975.

> been served shall serve a copy of the answers, and objections if any, within thirty (30) days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five (45) days after service of the summons upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Section 12 (1) of this act with respect to any objection to or other failure to answer an interrogatory.

Section 9 provides a procedure by which a party can compel another party to give written answers under oath to written questions for purposes of discovery. Although the authors recognize that written interrogatories to parties are certainly not new to any Mississippi practitioner, the new Act provides innovations both in the scope of discovery and in the procedure.

The threshold question that lawyers will face under the new provisions is whether to initiate the discovery process through the tried and sometimes true method of interrogatories or whether to proceed by oral deposition. Both procedures have advantages. Interrogatories are simple and inexpensive. The only expense is the time used to prepare the questions. Depositions, on the other hand, are expensive, and making the arrangements for the examination can be bothersome and time consuming.[254] Oral depositions, however, have profound advantages over any of the other discovery procedures since oral depositions allow the examining party to frame questions based on previous answers. The deponent has no opportunity to study the questions in advance and consult with his attorney as he does in responding to interrogatories. Attempted evasion during the taking of an oral deposition can be easily dealt with by vigorous and persistent examination.[255]

The interrogatory, however, certainly has a place in our new discovery procedure notwithstanding the desirablility of depositions in most situations. The interrogatory is a very effective way to obtain simple facts, to narrow issues, and to obtain information needed for the full use of other procedures such as depositions and requests for production of documents and things. Answers to interrogatories constitute the sworn testimony of the party and can be used for impeachment if oral examination at trial leads to inconsistencies.[256]

Section 9 provides that any party can propound written interrogatories to any other party. The procedure is limited to parties, but there is no requirement that they be either nominally or actually adverse.[257]

If a corporation, partnership, association, or governmental agency

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[254] 8 WRIGHT & MILLER § 2163, at 486.

[255] *Id.* at 486-87.

[256] *Id.*

[257] 4A MOORE ¶ 33.06, at 33-33.

is a party, interrogatories should be directed to the entity itself, and under section 9 it is incumbent upon that entity to designate an officer or agent who will answer the interrogatories "and furnish such information as is available to the party." The officer or agent must verify the answers on behalf of the entity which then becomes responsible for the answers and which will be estopped to deny their truthfulness.[258]

Section 9 does not specify any particular form for interrogatories and limits neither the number nor the sets of interrogatories that may be propounded. The number of interrogatories has been a factor, however, when the courts have had to determine whether the interrogatories are so burdensome and oppressive that the party is entitled to a protective order under section 2(3).[259]

Sound practice dictates that interrogatories consist of single questions, direct and to the point.[260] This is true especially if speedy discovery is important since an objection to an interrogatory defers the answer to that interrogatory until after a determination is made on the objection. If the questions are complicated, objections become more likely.[261]

Interrogatories can be served upon the plaintiff any time after the action is commenced. Interrogatories may be served upon any other party with or after service of summons upon that party. Generally, answers and objections must be filed within 30 days of service of the interrogatories. A defendant, however, does not have to answer or object any sooner than 45 days from the date of service of summons upon him. This means that if interrogatories are served on a defendant within 15 days of service of process, that defendant has more than 30 days, and as many as 45 days to answer or object. The time for filing answers provided in this section has obviated the need for leave of court to file interrogatories early because 45 days is ordinarily more than ample time for a defendant to retain counsel and prepare the answers.

Section 9 states that interrogatories must be "answered separately and fully." A "full" answer has been described as follows:

> Answers must be responsive, full, complete and unevasive. Insofar as practical they should be complete within themselves. Material outside the answers and their addendum ordinarily should not be incorporated by reference. If information from other answers is incorporated in a particular answer to avoid repetition, references should be specific rather than general.[262]

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[258] *Id.* ¶ 33.07, at 33-48 to -49; 8 WRIGHT & MILLER § 2172, at 538.

[259] Krantz v. United States, 56 F.R.D. 555, 558 (W.D. Va. 1972). *See also* 4A MOORE ¶ 33.12, at 33-70.

[260] 8 WRIGHT & MILLER § 2168, at 515.

[261] *Id.* § 2173, at 541.

[262] Pilling v. General Motors Corp., 45 F.R.D. 366, 369 (D. Utah 1968).

Evasive or cryptic answers are usually insufficient. The answer must be read in light of the question, however, and a cryptic or unclear question invites a cryptic or evasive answer.[263] "It is said colloquially 'Ask me a foolish question and I'll give you a foolish answer.' "[264]

If a party cannot furnish the information and details sought, he should so answer under oath, and the answer should set forth in detail the efforts made by the party to obtain the information.[265] Since a corporation, partnership, association, or governmental agency must designate a spokesman who must furnish *all* the information that is available to the party, a corporate spokesman cannot refuse to answer based on lack of knowledge where the knowledge is available to the corporation through sources other than the designated spokesman.[266]

An individual party is in no better position than a corporate party to claim lack of knowledge if the information sought can be secured by the party. Thus, an individual party cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.[267]

Objections to interrogatories must be filed, in writing, along with the answers. Objections must be specific and supported by a detailed explanation of why the interrogatory is objectionable. The objecting party does not need to give notice for a hearing on his objection. Accordingly, the burden is on the party serving the interrogatories to move for an order compelling an answer to the interrogatory under section 12(1).[268] If the court overrules the objection and grants an order compelling the party to answer, the court should, as a part of the order, set a time for answering. Presumably if no time is set for answering, the party will have 30 days from the date of the order to answer.[269]

Although the filing of an objection automatically relieves a party from answering the objectionable interrogatories, one is ill-advised to object to proper interrogatories merely for the purpose of delay. Section 12(1) provides that the prevailing party on a motion to compel answer to interrogatories may be entitled to expenses and attorney's fees.

Frequently objections to interrogatories are made because they seek irrelevant information not reasonably calculated to lead to relevant evidence, privileged information, information protected under the work product rule, or information of experts that is not discoverable. Although section 9 does not sanction oppression by interrogatories, it is not

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[263] 8 WRIGHT & MILLER § 2177, at 560.

[264] Pressley v. Boehlke, 33 F.R.D. 316, 317 (W.D.N.C. 1963).

[265] 4A MOORE ¶ 33.26, at 33-140.

[266] *Id.* ¶ 33.07, at 33-44.

[267] Hickman v. Taylor, 329 U.S. 495, 504 (1947).

[268] 8 WRIGHT & MILLER § 2173, at 541.

[269] 4A MOORE ¶ 33.24, at 33-130.

ordinarily grounds for objection to the discovery of relevant information that interrogatories are burdensome, that they seek information reasonably available to the one seeking the information, or that they require research and compilation.[270] The court, however, does have the power to make orders allocating part of the cost to the requesting party to prevent undue expense where the burden of compiling, segregating, and analyzing is great.[271] The court should weigh the burden and expense against the value of the information sought, keeping in mind the presumption in favor of liberal discovery.[272]

B. Scope, Use at Trial, Business Records

> (2) *Scope; use at trial.* Interrogatories may relate to any matters which can be inquired into under Section 2(2) of this act, and the answers may be used to the extent permitted by the rules of evidence.
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> An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.
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> (3) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

The scope of discovery by interrogatories is regulated by section 2(2) of the Act. Therefore, it is as broad as that allowed for all other types of discovery and is particularly analogous to depositions. Thus, the scope of interrogatories is not limited to the discovery of admissible evidence but extends to all matters relevant to the subject matter of the action.[273]

Interrogatories can be used to establish the identity of persons with knowledge of discoverable information and the existence and location of

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[270] *Id.* ¶ 33.27, at 33-151; 8 WRIGHT & MILLER § 2174, at 548.

[271] 4A MOORE ¶ 33.20, at 33-100 to -101.

[272] 8 WRIGHT & MILLER § 2174, at 548.

[273] Section 2(2)(a). *See also* 4A MOORE ¶ 33.11, at 33-66.

documents and tangible things. Accordingly, interrogatories inquiring into the possession and control of documents and tangible things can, for convenience sake, request the answering party to produce a copy of the document, but only if that party has possession and control over the document within the meaning of section 10.[274] Assuming, therefore, that proper identification of documents and things has been made, a request for production under section 10 can be combined with interrogatories, and the production must be made along with the response to the interrogatories.[275] There should certainly be no objection to serving one paper in lieu of two.[276]

Answers to interrogatories are admissible as evidence under section 9(2) "to the same extent permitted by the rules of evidence." Under Mississippi's existing rules of evidence interrogatories are automatically admissible. If the party who propounds the interrogatories fails to introduce them, they can be introduced by any other party.[277]

Under the new discovery provisions the scope of discovery has been greatly expanded, and the information sought by the discovery procedures is no longer limited to *admissible* evidence. The new provisions expand the scope of discovery so that questions must only be relevant to the subject matter or reasonably calculated to lead to the discovery of admissible evidence. Obviously the new provisions permit interrogatories that would be patently inadmissible under the existing rules of evidence. It is clear, then, that Mississippi must reexamine the blanket admission of interrogatories and answers into evidence. The prevailing view in the federal system is that interrogatories and answers constitute hearsay evidence that may or may not be relevant, competent or material under the general rules of evidence.[278]

Under the new provisions, an interrogatory is not objectionable merely because it seeks an opinion or conclusion related to facts or the application of law to facts. For example, an interrogatory is not objectionable merely because a plaintiff is asked what acts he contends constitute negligence. Thus, the only kind of interrogatory that is objectionable simply because it seeks opinion or conclusions is an interrogatory that extends to legal issues unrelated to the facts of the case.[279]

Where the proponent of the interrogatories can ascertain the answers just as easily as the interrogated party through the inspection of

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[274] 8 WRIGHT & MILLER § 2166, at 495.

[275] The time for responding is the same under both rules. *Compare* section 9(1), *with* section 10(2)(b).

[276] 4A MOORE ¶ 33.22, at 33-127.

[277] Standard Life & Accident Co. v. Tinney, 73 Miss. 726, 734, 19 So. 662, 664-65 (1896).

[278] 4A MOORE ¶ 33.29, at 33-164 to -165; 8 WRIGHT & MILLER § 2180, at 573.

[279] 8 WRIGHT & MILLER § 2167, at 513.

certain business records of the interrogated party, section 9(3) gives the interrogated party the option of producing the documents for inspection by the proponent rather than preparing written answers. The party served with interrogatories, however, cannot avoid answering them by offering the proponent of the interrogatories a mass of records that requires someone familiar with them to provide the necessary interpretation.[280]

C. *Existing Procedure*

Mississippi has had a procedure for propounding interrogatories to adverse parties for many years; this procedure will be repealed by the new provisions.[281] There are, however, irreconcilable differences between the theory of discovery under the new Act and the old interrogatory procedure. These differences relate to the scope of the new discovery provisions and to the use of answers to interrogatories. The basic procedures are related, but there are fundamental differences which should be noted.

Under the old procedure the interrogatories are filed with the clerk, and notice of filing is served by the sheriff upon the party or his attorney.[282]

> The evidence sought to be elicited by the interrogatories must be such as are pertinent or relevant to the litigation under consideration, and should not be used in such a way as to impose a burden upon the adverse party . . . .[283]

The answer under the old procedure must be served within 30 days of service of the interrogatories,[284] and although it is good practice to do so, answers under oath are not required.[285] In order to object to interrogatories, the proper practice under the old procedure is to move to suppress or to take exception prior to answering.[286] The sanctions imposed for failure to answer within 30 days are, for good cause shown, to dismiss or strike the answer and enter judgment by default.[287] Finally under the old procedure, the interrogatory may be used as evidence at trial. If the proponent of the interrogatories fails to introduce the answers at trial, they can be introduced by any other party.[288]

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[280] 4A MOORE ¶ 33.25[5], at 33-138.

[281] MISS. CODE ANN. § 13-1-51 (1972), repealed by section 22.

[282] *Id.* § 13-1-39.

[283] Morrison v. Guaranty Mortgage & Trust Co., 191 Miss. 207, 227-28, 199 So. 110, 115 (1940).

[284] MISS. CODE ANN. § 13-1-51 (1972).

[285] Everette, *supra* note 238, at 114.

[286] Morrison v. Guaranty Mortgage Co., 191 Miss. 207, 228, 199 So. 110, 116 (1941).

[287] MISS. CODE ANN. § 13-1-51 (1972).

[288] Standard Life & Accident Co. v. Tinney, 73 Miss. 726, 734, 19 So. 662, 665 (1896).

The interrogatory procedure under the new Act will not have to be relearned in toto by Mississippi practitioners. It is easy to see by a comparison of the new provisions with the old statute, at least procedurally, the interrogatory practice has not been drastically changed. The method of service,[289] objections to interrogatories,[290] sanctions for failing to answer,[291] and the use of interrogatories at trial[292] constitute the basic changes. The scope of discovery by interrogatory, however, is greatly expanded by the new provisions. Now, with interrogatories as with the other devices, the basic premise of discovery has been changed from seeking admissible evidence to seeking facts relevant to the subject matter.

X. Section 10. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

A. Scope

> (1) *Scope.* Any party may serve on any other party a request (a) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Section 2 (2) of this act and which are in the possession, custody or control of the party upon whom the request is served; or (b) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Section 2 (2) of this act.

Section 10 authorizes broad access to documents and objects in possession and control of another party. The scope of discovery under section 10 is coextensive with the other discovery procedures and is provided in section 2(2) of the Act. If a document is relevant—not privileged—and in the custody, possession, and control of the party, it must be produced upon request.[293]

Section 10 extends to documents, tangible things, and the entry upon land or property. The term "documents" is extensively described

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[289] Section 13. See part XIII *infra.*

[290] See note 268 and accompanying text *supra.*

[291] Section 12. See part XII *infra.*

[292] See part IX *B supra.*

[293] Section 2(2)(a).

by section 10, and this description is intended to keep up with "our constantly changing technology."[294]

Section 10 is applicable only to parties and to documents and things which are already in existence. A party will not be required to prepare a document or construct a model for the use of the adverse party.[295]

A request for production generally reaches all designated documents under control of the person or corporation, subject, of course, to objections grounded on privilege and relevancy. Production cannot be avoided merely because the document requested is kept in a place beyond the jurisdiction of the court where the action is pending. The test is control, not location;[296] actual possession of documents and things is not required. Thus, a party may be required to produce tax returns even though they are not in his possession since he has the right to custody of copies of his returns.[297]

B. Procedure

> (2) *Procedure.* (a) The request may, without leave of court, be served upon the plaintiff or complainant after commencement of the action and upon any other party with or after service of the summons upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.
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> (b) The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Section 12 (1) of this act with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

The procedure for production of documents and things is initiated with a "request" not a motion. A request for production can be made

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[294] 8 WRIGHT & MILLER § 2206, at 609.

[295] 4A MOORE ¶ 34.05[1], at 34-31 to -33.

[296] *Id.* ¶ 34.16, at 34-95, *citing In re* Harris, 27 F. Supp. 480, 481 (S.D.N.Y. 1939).

[297] 4A MOORE ¶ 34.17, at 34-98 to -99.

by a defendant at any time after the commencement of the action and by a plaintiff any time with or after service of process. The request must set forth what the party wishes to see and when, where, and how he wishes to examine it.

The party served with the request must file a written response within 30 days of service of the request. A defendant, however, does not have to answer any sooner than 45 days from the date of the service of process. The response must state either that the request is granted or refused, and if a request is refused the response must give specific reasons for rejecting the request.

Documents or things produced pursuant to a request for, or order compelling production are admissible into evidence only if admissible under the rules of evidence.[298]

As a general rule, judicial participation in discovery procedures should be infrequent. Accordingly, section 10 is designed in such a manner that details of inspection and production can be worked out by counsel extrajudicially, and its provisions offer both positive and negative inducements for attorneys to cooperate in production requests. First, when objections to production arise and before any court action is taken or any motions filed, each side knows what production is desired and the specific reasons for a party's refusal to comply with the request. With this information the attorneys will know precisely where they stand and thus, can usually resolve their differences extrajudicially.[299] Second, as a further inducement to stay away from court on discovery matters, section 12(1) provides that the prevailing party on a motion to compel production, absent a showing by the adverse party of substantial justification, will be awarded his attorney's fees and expenses.[300]

A request for production must "set forth the item to be inspected either by individual item or by category, and describe each item and category with reasonable particularity."[301] Particularity of designation is a matter of degree, and the sufficiency of the description is dependent upon the circumstances of each case. In most instances the party seeking discovery must precisely identify the documents before production is ordered. However, if the party cannot provide a detailed description but does give the best identification possible, the request may be granted provided the party from whom discovery is sought can easily ascertain which documents are requested.[302]

The goal is that the designation be sufficient to apprise a man of ordi-

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[298] 8 WRIGHT & MILLER § 2217, at 657.

[299] *Id.* § 2207, at 613.

[300] Section 12(1)(d). *See also* 8 WRIGHT & MILLER § 2207, at 614.

[301] Section 10(2).

[302] 8 WRIGHT & MILLER § 2211, at 628-29.

nary intelligence what documents are required and that the court be able to ascertain whether the requested documents have been produced.[303]

If a party fails to respond or objects to a request for production, the party requesting production can move for an order compelling discovery under section 12(1). Such a motion should be supported by affidavits showing that the party served with the request has possession, custody, or control over the documents requested.[304] If the requesting party does not have sufficient information to determine whether the other party has possession, custody, or control over the requested documents, he can either propound interrogatories or take a deposition to establish these facts.[305]

When a motion to compel production is filed, the court must decide whether the documents are relevant or privileged; whether special showing for work product or opinions of experts has been made; whether the objecting party has possession, custody, or control of the documents; and in general, whether the items sought are within the scope of discovery.[306] Although it is not ordinarily a valid objection that the request seeks a vast number of documents, the court can refuse the production of large quantities of documents if it is not satisfied that the documents are necessary for trial preparation or necessary to facilitate the proof and progress of the trial.[307] An objection based on the fact that the moving party already has knowledge of the facts he is seeking to discover is ordinarily insufficient. However, a court can refuse such discovery where it is convinced that the requesting party's knowledge is so complete that no good purpose will be served by the production.[308] The court can condition orders to reduce expenses and inconvenience. In this regard, the court will not ordinarily order ongoing business records to be produced in open court but will order production at the place of business or another convenient place. A party will not be compelled to pay for another party's photostats, models, or tests.[309]

Where material information is contained in documents that the other party should not be allowed to see, the court can offer protection by ordering the inspection to be made in the presence of the party who produced the document. Occasionally this problem arises when docu-

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[303] *Id.* at 631.

[304] 4A MOORE ¶ 34.05[1], at 34-35.

[305] *Id.* at 34-36.

[306] 8 WRIGHT & MILLER § 2214, at 643-44.

[307] 4A MOORE ¶ 34.19[2], at 34-106 to -107.

[308] 8 WRIGHT & MILLER § 2214, at 644-45. *See also* SEC v. Samuel H. Sloan & Co., 369 F. Supp. 994, 995 (S.D.N.Y. 1973) (discovery of public records would not be required if they were equally accessible to all parties).

[309] 4A MOORE ¶ 34.19[2], at 34-107 to -108.

ments containing trade secrets are requested, and of course, these documents must be treated carefully to avoid revelation of the secrets. Accordingly, the court may require that documents be submitted to it for examination *in camera* to determine whether to order inspection.[310]

In molding orders compelling production, courts must be guided by the spirit of the new Act which permits and encourages discovery before trial whenever possible. It is the realization of this underlying purpose which should promote cooperation in discovery requests. Moreover, when the court orders the production of documents or things the failure or refusal of a party to abide by the order will be met by the further sanctions of section 12(2).[311]

C. *Action Against Nonparties*

> (3) *Persons not parties.* This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Section 10, as discussed earlier, applies only to parties to pending actions. This section specifically provides that other methods of discovery from nonparties remain intact.[312]

D. *Coexisting Procedure*

The existing Mississippi statute providing for the production and inspection of documents and things and entry upon land was not repealed by the Act.[313] The existing procedure was amended in 1974, and presumably, the legislature intends for it to provide an alternative to section 10.

The existing procedure allows parties to a pending action, on good cause shown and upon notice to the adverse parties, to move for an order requiring the production of documents or tangible things or permit the entry upon land[314] or property.[315] The documents and things must be under the control of the opposing party, and they must contain "evidence relating to the merits of the action or . . . defense"[316] before the

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[310] *Id.* at 34-110 to -112.

[311] See section 12(2)(b) at part XII *B infra*.

[312] Depositions and subpoenas duces tecum are the most effective ways to obtain discovery from nonparty witnesses. Also, although seldom used, the ancient bill of discovery is still available in chancery court. V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 428, at 423 (2d ed. 1950).

[313] MISS. CODE ANN. § 11-1-51 (Supp. 1974) (not repealed by the Act).

[314] Homes and places of abode are exempt except in contractor's and materialmen's suits. *Id.* § 11-1-51(1).

[315] *Id.*

[316] *Id.*

court will order production. An order compelling production under the existing procedure must specify the time and impose the terms of the inspection.[317] Failure to comply with this order is met with such sanctions as contempt of court, a refusal to allow the delinquent party to introduce the documents, nonsuit or dismissal of plaintiff's case, and default judgment against a defendant.[318]

The existing procedure personifies the old scope of discovery. The old standard limits production to documents that "contain evidence."[319] Under section 10 of the new discovery provisions the documents must merely be relevant to the subject matter of the pending action and reasonably calculated to lead to the discovery of admissible evidence. The difference, then, is that the utility of the existing procedure is in the *gathering of evidence* for trial, while the new discovery provisions permit the *discovery* of all documents, whether evidence or not, that are relevant and might be useful in piecing together a claim or defense or that are reasonably calculated to lead to admissible evidence.[320]

The existing procedure cannot ordinarily, and was not designed to operate extrajudicially. The obligation to produce documents under the existing procedure is not incurred until after the court orders production. Likewise, there are no incentives under the existing procedure for the parties to work out discovery problems themselves, and to that extent, the act is wasteful of the judiciary's time. The new provisions are designed to accomplish production without involving the judiciary in routine administrative matters. As will be noted, there are substantial penalties under the new Act for parties who cause the judiciary to become involved unnecessarily.[321]

Finally, the existing procedure provides that the motion must show good cause for compelling production. Under the new procedure the reverse is true. A request for production under section 10 does not need to show good cause, but to avoid production sought by such a request, a party must file a written objection specifying the party's reasons for not producing the document or thing.

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[317] *Id.*

[318] *Id.*

[319] The statute actually reads "containing evidence relating to the merits of the action or proceeding or of the defense thereto . . . ." *Id.*

[320] The distinction between the scope of the new provisions and the old procedure is illustrated by the following description of the scope of the old procedure:

> By no means is this procedure a blanket authorization or a dragnet fishing operation. Good cause must be shown for the motion and an opportunity afforded for objection *ab initio*. The information sought must be specific and particular, and clearly appear to be material, and admissible as evidence relating to the merits of the action or defense.

Everette, *supra* note 238, at 118.

[321] See section 12(1)(d) at part XII *A infra*.

XI. SECTION 11. REQUESTS FOR ADMISSION

A. *Request for Admission*

> (1) *Request for admission.* (a) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Section 2 (2) of this act set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff or complainant after commencement of the action and upon any other party with or after service of the summons upon that party.

The significance of this provision[322] is its simplification and centralization of an heretofore haphazard and sometimes costly procedure for admissions in Mississippi. Prior to the Act, there was no definable method of obtaining pretrial admissions as such. In general, admissions could be found in pleadings,[323] depositions,[324] interrogatories,[325] stipulations,[326] affidavits,[327] and testimony.[328] These vehicles for admissions stretch from pretrial to appeal, and in all of these forms admissions are uselessly bound up in the myriad and sometimes complex rules and procedures regulating the forms themselves. Admissions, direct and representative, are, of course, an exception to the hearsay rule in some instances.[329]

Section 11, to which federal rule 36 corresponds, primarily concerns the pretrial stage of a proceeding. However, by vastly simplifying and making available a definite procedure for pretrial admissions, the section will reach not only into the trial but also into the appellate process. In the use of the new procedure, costs and time in proof should be cut

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[322] For a general discussion of FED. R. CIV. P. 36, to which section 11 corresponds, see 4A MOORE ¶¶ 36.01 *et seq.*; WRIGHT § 89; 8 WRIGHT & MILLER §§ 2251-65; Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371 (1962).

[323] Simon v. Desporte, 150 Miss. 673, 679, 116 So. 534, 535 (1928); T. MCELROY, MISSISSIPPI EVIDENCE § 42, at 189 (1955).

[324] *See* MISS. CODE ANN. § 13-1-47 (1972). This section will be repealed by section 22 effective January 1, 1976.

[325] *Id.*

[326] *E.g.*, Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 593-94, 172 So. 2d 196, 201-02 (1965).

[327] *Cf.*, Phillips v. Cooper, 50 Miss. 722 (1874); Brent v. Heard, 40 Miss. 370, 373-74 (1866).

[328] *E.g.*, Gates v. Murphree, 286 So. 2d 291, 292 (Miss. 1973).

[329] *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 262-75 (2d ed. E. Cleary ed. 1972); T. MCELROY, *supra* note 323, § 42, at 188.

substantially, and issues at trial narrowed to reasonable proportions, especially when the provision is considered not so much as one of discovery but one of convenience and dispatch.[330] This perspective is important for the proper functioning of the expeditious nature of section 11 because by its terms, there is no "discovery" in a request for admission. A request is just that—a request for the admission of facts already known or strongly suspected or of the genuineness of documents in hand.[331] When viewed in this light section 11 approaches the nature of a stipulation,[332] but with its sanctions section 11 provides something more than the voluntary agreement of adverse parties.

The Act makes the new provisions for depositions[333] and interrogatories[334] available in conjunction with requests for admission by not restricting the frequency with which these discovery methods may be used.[335] However, the nondiscovery nature of requests for admissions should be kept in mind when they are used with depositions and interrogatories, which are true discovery devices.[336]

In short, section 11, like federal rule 36, will serve "first to facilitate

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[330] The federal courts, although disagreeing on relevancy and opinion issues in interpreting federal rule 36 prior to the 1970 revisions, generally have agreed that the purpose of rule 36 is to expedite the proceeding. Burns v. Phillips, 50 F.R.D. 187, 188 (N.D. Ga. 1970); Jones v. Boyd Truck Lines, Inc., 11 F.R.D. 67, 69 (W.D. Mo. 1951); *see* 4A MOORE ¶ 36.02, at 36-15; 8 WRIGHT & MILLER § 2252, at 704.

The state courts in states having similar provisions are generally in accord. *E.g.*, Voisin v. Luke, 249 La. 796, 191 So. 2d 503, 506 (1966), *construing* LA. CODE CIV. P. art. 1496 (1960).

[331] WRIGHT § 89, at 393; *see* Finman, *supra* note 322, at 373; *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 968 (1961).

> Rule 36(a) was not designed to make discovery of the existence of facts, as such. It was designed as an effective method to discover and circumscribe contested factual issues in a case, either basic or ultimate facts, so that the disputed issues may be clearly and succinctly presented to the trier of facts.

Jones v. Boyd Truck Lines, Inc., 11 F.R.D. 67, 69 (W.D. Mo. 1951); *accord*, Ranger Ins. Co. v. Culberson, 49 F.R.D. 181, 182-83 (N.D. Ga. 1969).

[332] *See* note 326 and accompanying text *supra*. This conclusion has been suggested with respect to federal rule 36 and federal rule 16 which involves stipulations. Comment, *The Dilemma of Federal Rule 36*, 56 NW. U.L. REV. 679, 686 (1961); *cf.* WRIGHT § 89, at 393.

[333] Sections 6 through 8 of the Act. See parts VI through VIII *supra*.

[334] Section 9 of the Act. See part IX *supra*.

[335] Section 2(1) of the Act provides for unrestricted frequency of use.

[336] In one federal case where purported interrogatories were found to be requests for admissions of fact, the use of the answers to the interrogatories was limited as required by the admissions' procedures. Leonia Amusement Corp. v. Loew's Inc., 18 F.R.D. 503, 508 (S.D.N.Y. 1955).

Additionally, under federal rule 36, interrogatories may be served dealing with the same matter as a prior request for admission, but this does not excuse response to the request. 8 WRIGHT & MILLER § 2259, at 727; see note 416 and accompanying text *infra*.

proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be."[337]

Section 11(1)(a) provides for admissions concerning matters relating to statements or opinions of fact or the application of law to fact. The matter of fact sought to be admitted must be set forth in the request. Prior to the 1970 revision of the Federal Rules of Civil Procedure the federal courts were divided on the opinion-fact issue in federal rule 36,[338] but with the 1970 revision of rule 36 which added the opinion-fact provision the issue was apparently eliminated,[339] making even the contentions of the parties discoverable.[340] On its face, section 11 would seem to give little leeway for a different interpretation by the Mississippi courts as to the validity of factual opinion. However, a request calling for a pure conclusion or opinion of law is improper.[341] Requests for the admission of the truth of statements applying law to the facts of the case are specifically allowed in section 11(1)(a).[342]

Section 11(1)(a) expressly provides that the scope of requests for admission is governed by section 2(2) of the Act which provides that the scope of discovery in general reaches any matter, not privileged, which is relevant to the subject matter involved in the pending action; it is not objectionable that the information sought will not be admissible at trial if it is reasonably calculated to lead to the discovery of admissible evidence.[343] Even though the scope of requests for admissions should "serve to reduce technical objections to requests, certainly the careful practitioner should avoid the use of requests for admission when he is seeking information useful in his chain of investigation but not admissible at the trial."[344] Requests should consist of questions that are generally capable

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[337] 4A MOORE ¶ 36.01[7], at 36-9.

[338] WRIGHT § 89, at 394.

[339] 4A MOORE ¶ 36.04[4], at 36-40; see Lumpkin v. Meskill, 64 F.R.D. 673 (D. Conn. 1974) for a discussion of the history of the opinion-fact issue and an interpretation of federal rule 36 in regard to abstract sampling in a school racial composition suit. *See also* 4A MOORE ¶ 36.04[4], at 36-35.

[340] 4A MOORE ¶ 36.04[4], at 36-40.

[341] *Id.* at 36-40 to -41; WRIGHT § 89, at 394, *citing* United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962) (court may draw legal conclusions from facts found in requests for admission); 8 WRIGHT & MILLER § 2255, at 710.

[342] Under the federal rules, "[o]pinions on abstract propositions of law are still objectionable, but requests seeking admission of the truth of statements applying law to the facts of the case are specifically sanctioned . . . ." 4A MOORE ¶ 36.04[4], at 36-40 to -41.

[343] See part II *A* & *B supra*.

[344] 4A MOORE ¶ 36.04[2], at 36-33. "[O]ver-zealous attempts to get into evidence that which is inappropriate or improper, may result in a tangled web of appeal procedures." Thompson, *Vistas of Amended Rule 36 of the Federal Rules of Civil Procedure*, 6 FORUM 171, 172 (1972); *e.g.*, Burns v. Phillips, 50 F.R.D. 187 (N.D. Ga. 1970); *see* 8 WRIGHT & MILLER § 2254, at 708, 710.

of "yes or no" answers.[345]

According to Professor Moore, privilege should rarely pose a problem in requests for admission, at least as far as federal rule 36 is concerned, since a fact can be admitted or denied without reference to the nature of any communication from which one learned the fact.[346] The only two areas of privilege mentioned as topics of concern in the federal system involve the constitutional privilege against self-incrimination and the attorney-client privilege. Both Professors Moore and Wright agree that the privilege against self-incrimination should be a valid objection to a request for admission in a civil case out of which criminal charges have arisen, even though there are federal decisions to the contrary.[347] The attorney-client privilege has been kept intact to the extent that objections to requests for admission of what advice was given to a client on a particular occasion have been upheld.[348]

However, privilege may be more of a problem than these two areas indicate. The scope of requests for admission under the Mississippi and federal provisions is governed by the general scope of discovery in section 2(2) of the Act and correspondingly in federal rule 26 which restricts discovery to *unprivileged* matter. A recent federal case quoting Professor Wright held that

> an . . . objection will lie if a request goes beyond the scope of discovery as broadly defined in Rule 26 (b). Privileged information is not within that scope; a request is improper when a valid objection of privilege would lie if the request, reformulated as a question, were put to the party at trial.[349]

The genuineness of documents is a proper subject for requests for admission under the Act. The document should be described in the request, and copies of the documents should be served with the request unless they have been made available for inspection and copying. It should be noted that a request for an admission concerning a document is limited to the "genuineness" of the document itself, and a request should not be concerned with interpretation of the terms.[350] Additionally, the Act only requires copies to be served and not originals. The scope and relevancy of documents which are the subject of a request for admission is governed by the general scope of discovery provided in

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[345] 4A MOORE ¶ 36.05[4], at 36-67 n.21; *cf.* 8 WRIGHT & MILLER § 2260, at 728.

[346] 4A MOORE ¶ 36.04[3], at 36-33; *see* 8 WRIGHT & MILLER § 2254. See part II *B supra*.

[347] 4A MOORE ¶ 36.04[3], at 36-34; WRIGHT § 89, at 394.

[348] Shawmut, Inc. v. American Viscose Corp., 12 F.R.D. 488 (D. Mass. 1952), *cited in* 4A MOORE ¶ 36.04[3], at 36-35.

[349] Kenyatta v. Kelly, 375 F. Supp. 1175, 1177 (E.D. Pa. 1974), *quoting* 8 WRIGHT & MILLER § 2262, at 734.

[350] 4A MOORE ¶ 36.03[4], at 36-21.

section 2(2) of the Act. Thus, in order to make a document the subject of a request for admission, it should relate to the subject matter and should be unprivileged;[351] it is not objectionable that the information sought will not be admissible at trial.[352]

Leave of court is not required for initiating the admission procedure where the request is served upon the plaintiff or complainant after the action has begun or upon other parties after they have been served with a summons.

B. Time Limits, Available Responses, Sufficiency of Response

> (b) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the summons upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to Section 12 (3) of this act, deny the matter or set forth reasons why he cannot admit or deny it.
>
> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with

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[351] *See* notes 346 & 347 and accompanying text *supra*.

A successful privilege objection here is rather doubtful since the person seeking the admission either has the document in his possession or has ready access to it. *See* 4A MOORE ¶ 36.03[5], at 36-24. *But see* Kenyatta v. Kelly, 375 F. Supp. 1175, 1177 (E.D. Pa. 1974) ("[T]he right to object on the ground of privilege is not lost merely because there has been disclosure.").

[352] *See* 4A MOORE ¶ 36.03[5], at 36-23 to -24.

the requirements of this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. Section 12 (1) (d) applies to the award of expenses incurred in relation to the motion.

1. Time Limits

Section 11 sets 30 days after service of a request as the time within which a written answer or objection to the request must be made, except that a defendant has 45 days after service of summons upon him to respond unless the court shortens the time. If a response is not made within these time limits, the matter is admitted.[353] The court does have the discretion under section 11(1)(b) to shorten or extend the 30-day time period.[354] A written answer or objection, addressed to the matter, and signed by the party or by his attorney is required. Each matter sought to be admitted should be separately set forth in the request.

2. Responses

Under section 11(1)(b) a party upon whom a request for admissions has been served has a variety of courses to take. First of all, of course, the party may respond to the request within the time limits. Any response must be in writing and signed by the party or his attorney. For convenience, the response should be in a single document with specific

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[353] Some federal courts have permitted late filing of responses by treating the responses as a withdrawal of the admission made by operation of the rule or as an amendment to the admission. *E.g.*, United States v. Cannon, 363 F. Supp. 1045, 1049 (D. Del. 1973); Pleasant Hill Bank v. United States, 60 F.R.D. 1, 3 (W.D. Mo. 1973) (court adopted the test of federal rule 36(b)—equivalent to section 11(2) of the Act—as the standard for permitting late filing as withdrawal or amendment); 8 WRIGHT & MILLER § 2257, at 720.

[354] Under federal rule 36, this discretion is also present. *E.g.*, French v. United States, 416 F.2d 1149, 1152 (9th Cir. 1969).

What is sufficient reason for allowing more or less time is apparently decided on a case-by-case basis. Some courts have seemed to require exceptional or extraordinary circumstances to extend the time for response. *E.g.*, Adley Express Co. v. Highway Truck Drivers Local 107, 349 F. Supp. 436, 449 (E.D. Pa. 1972), *supplemented*, 365 F. Supp. 769 (E.D. Pa. 1973). Other courts have been more lenient; for example, illness may be an excuse. *Compare* Woods v. Robb, 171 F.2d 539, 541 (5th Cir. 1948), *with* Creedon v. Taubman, 8 F.R.D. 268, 269 (N.D. Ohio 1947).

Other examples include: Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D. Mo. 1973) (extension granted where plaintiff knew formal proof of matter would be required); Driver v. Gindy Mfg. Corp., 24 F.R.D. 473, 474 (E.D. Pa. 1959) (mistake of law not sufficient excuse for failure to meet time limits of rule 36); Walsh v. Connecticut Mut. Life Ins. Co., 26 F. Supp. 566, 573 (E.D.N.Y. 1939) (seeking construction of rule with good faith refusal to respond to requests sufficient to move for additional time). *See* 4A MOORE ¶ 36.05[4], at 36-60 to -61; 8 WRIGHT & MILLER § 2257, at 719.

reference to the particular matters.

The party served may respond by answer admitting the truth or genuineness of the pertinent matters. This admission conclusively establishes that matter unless the court on motion permits withdrawal or amendment of the admission.[355] If a single matter is the subject of the request, a simple admission should suffice. However, in cases of multiple requests for admissions in a single document, the party should specify which parts are admitted and make an appropriate response to all of the remaining matters.[356]

The party served with the request may answer by "specifically" denying the matter.[357] A denial must fairly meet the substance of the requested admission,[358] and when good faith requires a qualified answer or a denial of only a part of the matter, the party must specify the parts admitted as true and qualify or deny the remainder.[359]

If the matter cannot be denied or admitted, the party may respond by setting forth in detail the reasons why he cannot truthfully admit or deny the matter. The response here is sufficient to avoid an admission by default. What is good reason for such a response must await judicial interpretation by the state courts, but it appears certain that a failure to give reasons will result in an admission or an order for an amended answer.[360] Section 11(1)(b) makes it clear that lack of information or

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[355] With regard to withdrawal or amendment, see note 353 *supra* and notes 395 through 399 and accompanying text *infra*.

[356] Section 11(1)(b) provides that

> when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.

See 4A MOORE ¶ 36.05[4], at 36-66; 8 WRIGHT & MILLER § 2259, at 726.

[357] Section 11 of the Act contains the language "specifically" deny. The best practice would be to specifically *admit* as well.

Federal rule 36 similarly requires a specific denial. A response denying "each and every matter and statement" contained in a request for admission has been held insufficient. Strasser v. Fascination Candy Co., 7 F.R.D. 267, 269 (N.D. Ill. 1945); *see* 4A MOORE ¶ 36.05[4], at 36-64 to -65; Annot., 36 A.L.R.2d 1192 (1953).

[358] Federal rule 36 has the same requirement. *See, e.g.*, Southern Ry. v. Crosby, 201 F.2d 878 (4th Cir. 1953) (denial of accuracy of statement in request not a denial within rule 36 and therefore matter admitted); *see* 8 WRIGHT & MILLER § 2260, at 728.

[359] With respect to federal rule 36,

> [t]he party answering the question may qualify his answer at trial, but this does not solve the problem of questions that are susceptible to several interpretations. The trial should not be used to explain answers to improper questions, but to determine the issues. The questions submitted should be such that they are generally capable of a yes or no answer.

4A MOORE ¶ 36.05[4], at 36-67 n.21, *citing* Johnstone v. Cronlund, 25 F.R.D. 42, 46 (E.D. Pa. 1960); *see* United States v. Watchmakers of Switz. Information Center, Inc., 35 F.R.D. 203, 204 (S.D.N.Y. 1960); 8 WRIGHT & MILLER § 2260, at 728.

[360] *See* United States v. Schine Chain Theatres, 4 F.R.D. 109 (S.D.N.Y. 1944); 8

knowledge is not a sufficient reason for failing to admit or deny unless the party states in his answer that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. "Reasonable inquiry," "readily obtainable," and "insufficient" are all broad phrases and words, and until the courts make some definitive statements on these issues, the practitioner will face uncertainty in dealing with them.[361] A failure to state that reasonable inquiry was made will negate the use of the insufficiency reason as grounds for failing to admit or deny.[362] It should be noted that if the fact sought to be admitted is exclusively within the knowledge of the party serving the request, the other party should not be required to admit the truth of the facts since it is not reasonably within his power.[363]

Objection constitutes the second category of response to a request for an admission. A party who feels that a requested admission is improper may challenge the request by objecting.[364] The objection must be in a written response within the time limits and signed by the party or his attorney. The reasons for the objection must be stated. By the

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WRIGHT & MILLER § 2261, at 730.

[361] The federal cases offer some direction. In one case in which the requests for admissions were directed at atmospheric conditions and pilot licensing at the time of the crash of a private airplane, the defendant objected to the requests on the grounds of no specific knowledge and on grounds of proving the adversary's case. The court, first finding that the defendant could not simply fail to answer because of no independent knowledge of the facts, held that the defendant must at least make a reasonable effort to obtain the information. If the information was neither within the knowledge of the defendant nor within the reasonable capability of the defendant to obtain, the defendant could, within rule 36(a)(1), set forth specific facts showing her inability to verify the requested information. The court denied the defendant's objections to the requests and directed her either to admit, deny, or set out specific facts why she could not. The court specifically spoke to a reasonable attempt at verification of the facts with a letter or telephone call to the Federal Aviation Administration library in Oklahoma City. Ranger Ins. Co. v. Culberson, 49 F.R.D. 181, 183 (N.D. Ga. 1969).

> A United States District Court in Missouri has held
> that if from all the circumstances now known to defendants they can make answer to the instant requests, they should do so, even though it may require the forming of a conclusion by them from circumstantial evidence.

Jones v. Boyd Truck Lines, Inc., 11 F.R.D. 67, 70 (W.D. Mo. 1951).

[362] *See* Ranger Ins. Co. v. Culberson, 49 F.R.D. 181 (N.D. Ga. 1969). Reasonableness of the inquiry may be inferred. Adley Express Co. v. Highway Truck Drivers Local 107, 349 F. Supp. 436, 451-52 (E.D. Pa. 1972).

[363] J.R. Prewitt & Sons v. Willimon, 20 F.R.D. 149, 151 (W.D. Mo. 1957), *cited in* 8 WRIGHT & MILLER § 2261, at 732 n.30; *see* 4A MOORE ¶ 36.05[4], at 36-66 to -67.

[364] In regard to federal rule 36,

> [t]he party served with a request for an admission which he finds legally objectionable shall respond thereto not by denying the requested admission but by making written objection upon whatever legal grounds he feels himself entitled to under Rule 36.

Dulansky v. Iowa-Ill. Gas & Elec. Co., 92 F. Supp. 118, 123 (S.D. Iowa 1950).

terms of the section, an objection should not lie for requests calling for opinions of fact or answers applying law to fact, or requests concerning documents where only a copy is served, or requests concerning facts not within the party's knowledge. Section 11(1)(b) specifically provides that a party may not object to a request on the ground that a matter sought to be admitted presents a genuine issue for trial, and further provides that the party may deny the matter or set forth reasons why he cannot admit or deny subject to the sanctions in section 12(3).[365] Equally, a request should not be objectionable merely because a party feels the requesting party should bear the expense and burden of proving the matter sought to be admitted.[366]

Objections should lie for requests concerning matter outside the scope of the Act (section 2(2)) which is also the scope of matters subject to requests for admissions.[367] Thus, objections would be proper if the matter is privileged[368] or irrelevant to the subject matter.[369] However, an objection would *not* be proper under section 2(2) on the grounds that the requested matter is inadmissible at trial if the information sought is designed to lead to the discovery of admissible evidence.[370] Section 11(1)(b) does provide that the requesting party may move the court for a determination of the sufficiency of the objection.[371]

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[365] *See* 4A MOORE ¶ 36.04[8], at 36-51; 8 WRIGHT & MILLER § 2254, at 710. *But cf.* Pleasant Hill Bank v. United States, 60 F.R.D. 1, 4 n.1 (W.D. Mo. 1973).

Prior to clarification of the issue in the 1970 amendments to federal rule 36, the federal courts had split on whether a request concerning controverted issues was proper. 8 WRIGHT & MILLER § 2256, at 716 nn.55 & 56.

The sanctions referred to are found in section 12(3) which provides that subsequent prevailing proof on a matter by a party who had requested that the matter be admitted, but which was denied, may allow the prevailing party to recover the expense of putting on the proof. See text accompanying notes 407 through 414 *infra*.

One federal judge soundly criticized requests for the admission of controverted facts under the pre-1970 rule 36:

> A request for admissions as to disputed facts appears to be nothing more than an attempt by one party, in anticipation of a favorable verdict at trial, to lay a foundation for transferring to the other party a large part of the costs of the lawsuit, pursuant to Rule 37(c) [to which section 12(3) corresponds] . . . .

Peck v. Clesi, 37 F.R.D. 11, 12 (N.D. Ohio 1963), *cited in* 4A MOORE ¶ 36.04[8], at 36-52.

[366] *Cf.* Ranger Ins. Co. v. Culberson, 49 F.R.D. 181, 183 (N.D. Ga. 1969); Dulansky v. Iowa-Ill. Gas & Elec. Co., 92 F. Supp. 118, 124 (S.D. Iowa 1950).

[367] With respect to federal rule 36, the rule is the same. Kenyatta v. Kelly, 375 F. Supp. 1175, 1177 (E.D. Pa. 1974).

[368] See notes 346 through 349 and accompanying text *supra*; *see* 4A MOORE ¶ 36.06, at 36-71; 8 WRIGHT & MILLER § 2262, at 734.

[369] See note 343 and accompanying text *supra*.

[370] See section 2(2) at part II *B supra*; note 343 and accompanying text *supra*.

[371] See part XI *B*(4) *infra*. This is the first time the court becomes involved with objections, otherwise leaving the matter to the parties. *See* 8 WRIGHT & MILLER § 2263, at 736-37.

The party upon whom a request is served may seek a protective order of the court under section 2(3) of the Act to protect himself from annoyance, embarrassment, oppression, or undue burden or expense. The protective order should be sought by motion for good cause shown.[372]

A party served with a request may seek an extension of the 30-day time period in which to respond. Section 11(1)(b) specifically grants the court the power to *extend* the time, except that in the case of a defendant served with a request the court apparently may only *shorten* the 45 days in which the defendant is allowed to answer. Section 11(1)(b) does not specify what would be sufficient reason for an extension,[373] nor whether a motion with appropriate notice to opponents should be made or whether an ex parte application will suffice. The federal courts allow an ex parte application under rule 36 for an extension if it is made before the specified time period,[374] but require a motion if an extension is desired after the expiration of the time period where the failure to act was the result of excusable neglect.[375] Some federal courts have used the power to extend time to permit a late response, treating the response as a withdrawal of the automatic admission or as an amendment to the admission.[376]

3. Failure to Respond

The party upon whom the request is served may, of course, do nothing. Section 11(1)(b) specifically provides that such a failure to respond will result in an automatic admission which "conclusively" establishes the matter. The court should have the power to permit withdrawal or amendment of the admission in certain circumstances.[377] Similarly, the federal courts have permitted late responses where the delay was not caused by any lack of good faith.[378]

This automatic admission upon a failure to respond is the only sanction the Act provides for such a failure, and indeed, it is enough.[379]

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[372] For a discussion of protective orders, see part II *F supra*.

[373] See note 354 and accompanying text *supra*.

[374] 8 WRIGHT & MILLER § 2257, at 719. This rule is based upon federal rule 6(b), which has no counterpart in current Mississippi procedure.

[375] *See* FED. R. CIV. P. 6(b); notes 353 & 354 *supra*.

[376] See notes 353 & 354 and accompanying text *supra*.

[377] With respect to withdrawal and amendment, see notes 395 through 399 and accompanying text *infra*.

[378] 4A MOORE ¶ 36.05[4], at 36-61; *see, e.g.*, French v. United States, 411 F.2d 1149 (9th Cir. 1968); see note 353 and accompanying text *supra*.

[379] In regard to federal rule 36, *see, e.g.*, Jackson v. Riley Stoker Corp., 57 F.R.D. 120 (E.D. Pa. 1972).

The sanctions under section 12(3) of the Act are available only when some sort of response is made—a failure to *admit*—and not when the party fails to *respond* at all, in which case the matter is automatically admitted. Section 12(3) provides for the award of

If dispositive facts are admitted by default, there is a danger of summary judgment against the admitting party.[380] An automatic admission under this section should, and can, be avoided by making a response within the appropriate time limits. If an automatic admission occurs, it should still be subject to pertinent objections if introduced at trial.[381]

4. Sufficiency of Response

After an answer or objection has been served on the party requesting the admission, section 11(1)(b) provides that the requesting party may move to determine the sufficiency of the objection or answer. At this stage, the court on motion enters the dispute for the first time if no time issue has previously arisen, and the sanctions of section 12(1)(d) similarly become applicable.

With respect to objections, the party who objects (provided he has met the time limits and technical requirements) has passed the initiative back to the requesting party, and the objecting party is required to do nothing more until the court determines the sufficiency of the objection, if so moved by the requesting party.[382] Section 11(1)(b) provides that unless the court finds the objection justified,[383] it shall order an answer served. Intrinsically this language indicates that notice should accompany the motion, and an adversary hearing should follow the motion to determine the sufficiency of an objection. The provision for award of expenses with its requirement of a hearing on the motion bolsters this conclusion.

The sanction provided in this section is an incorporation of section 12(1)(d) which provides that if the moving party (the requesting party) prevails on the motion, the objecting party or his attorney or both may be ordered to pay the moving party reasonable expenses incurred in obtaining the order. If the motion is denied, the moving party and his attorney likewise may be liable for expenses to the party who successfully objected. A partial granting of the motion may result in an apportionment of expenses.[384] These sanctions are double-edged devices for

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costs and expenses of proof to the proponent where the party from whom an admission was requested failed to admit the matter which was subsequently proved at trial. Accordingly, if the matter is automatically admitted upon failure to respond, there is no need for proof at trial. *See* 4A MOORE ¶¶ 36.05[4], at 36-61, 37.04, at 37-80; 8 WRIGHT & MILLER § 2265, at 747. See notes 407 through 414 and accompanying text *infra*.

[380] Summary judgment is possible under federal rule 56. *E.g.*, Williams v. Krieger, 61 F.R.D. 142 (S.D.N.Y. 1973); Shapiro, Bernstein & Co. v. Log Cabin Club Ass'n, 365 F. Supp. 325 (N.D.W. Va. 1973); *see* MOORE ¶ 37.04, at 37-83; 8 WRIGHT & MILLER § 2264, at 739.

[381] *See* 8 WRIGHT & MILLER §§ 2259, 2264.

[382] *See* 4A MOORE ¶ 37.04, at 37-81; 8 WRIGHT & MILLER § 2263, at 737 n.56.

[383] See generally notes 364 through 370 and accompanying text *supra*.

[384] *See* 4A MOORE ¶ 37.04, at 37-81. See part XII *A infra*.

cutting through dilatory or otherwise unsavory tactics: unwarranted objections should be eliminated, and valid objections should be recognized by a party as such and not "tested" merely for purposes of harassment.[385] The sanctions are not imposed without a hearing and are not available if either the motion or opposition to the motion is substantially justified.[386]

Improper objections, subject to a sufficiency motion, might include objections to a request calling for opinion, statements of fact, or answers applying law to fact; objections to requests with copies of documents; objections to requests for admission of facts not within the party's knowledge; objections to requests covering genuine issues at trial; or objections on the ground that the requesting party has the burden and expense of proving the matter.[387] An objection on the ground the matter is inadmissible at trial is also improper if the information is reasonably calculated to lead to discovery of admissible evidence.[388]

With respect to a motion to determine the sufficiency of an answer, if the court determines that an answer does not comply with the requirements of the section, the court may order either that the matter is admitted or that an amended answer is to be served. Motions to determine the sufficiency of the answer to a request are subject to the same sanctions as the motion to determine the sufficiency of an objection to a request. The sanctions available to the court on this motion should discourage less than responsive answers and unwarranted motions questioning the sufficiency of answers.

An insufficient answer, subject to the motion under section 11(1)(b), would be one that does not specifically deny the matters in the admission,[389] one in which a denial does not fairly meet the substance of the requested admission,[390] one which an admission or denial is improperly qualified,[391] one which omits reasons for failing to admit or deny,[392] or one which gives "lack of information" as the reason for failing to admit or deny without a statement of reasonable inquiry.[393] One federal court has held on motion for summary judgment that an untimely and incomplete answer under a rule 36 request is an admission, appar-

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[385] *See* 4A Moore ¶¶ 36.06, at 36-74, 37.04, at 37-81; 8 Wright & Miller § 2263, at 736.

[386] See part XII *A infra*.

[387] See generally notes 365 & 366 and accompanying text *supra*.

[388] See note 370 and accompanying text *supra*.

[389] See note 357 and accompanying text *supra*.

[390] See note 358 and accompanying text *supra*.

[391] See note 359 and accompanying text *supra*.

[392] See note 360 and accompanying text *supra*.

[393] See note 361 and accompanying text *supra*.

ently without any prior motion to determine the sufficiency of the answer.[394]

In lieu of ordering an answer to a request where an objection is attacked by the motion to determine the sufficiency as unjustified, or ordering an admission or amended answer to a request where the answer is deemed noncomplying, the court may determine that final disposition of the request for admission will be made at a pretrial conference or at another designated time prior to trial.

C. *Effect of Admission*

> (2) *Effect of admission.* Any matter admitted under this section is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Any matter admitted under this section, whether by design, insufficiency, or default, is conclusively established unless the court on motion permits withdrawal or amendment of the admission.[395] Under this section the court may permit withdrawal or amendment of the admission when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Section 11(2) does not specify when the merits will be subserved, nor what constitutes prejudice to the case of the one who requested the admission. In the federal courts a withdrawal or amendment has been said to subserve the merits when an admission is no longer true because of particular circumstances, or where an admission was inadvertently made through honest error; likewise, prejudice has been said to refer to the prejudice arising from reliance on the conclusive effect of an admission.[396]

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[394] Shapiro, Bernstein & Co. v. Log Cabin Club Ass'n, 365 F. Supp. 325 (N.D.W. Va. 1973); *see* 8 WRIGHT & MILLER § 2263, at 737.

[395] For other possible applications of this subsection and federal rule 36, see notes 360, 376 & 377 and accompanying text *supra*.

With respect to federal rule 36(b), see 4A MOORE ¶ 36.08, at 36-76; 8 WRIGHT & MILLER § 2264, at 739.

[396] 8 WRIGHT & MILLER § 2264, at 744-45.

An apparent conflict in the Act can be found between the provision in section 11(2) for amendment of admissions and the general provision of section 2(5) for supplementation of responses to all discovery. The conflict is the same in federal rules 26(e) and 36(b).[397] Section 11(2) requires that before an amendment is allowed, there must be *court action* on a showing of subserving the merits, as well as a failure to show prejudice to the requesting party's case. Section 2(5)(b), however, *without* court action, places a party under a duty to amend a prior response to any discovery if he obtained information upon the basis of which he knows his prior response was incorrect or has become incorrect. Professor Moore has suggested a solution to the problem in the federal rules that would seem to be proper for the state as well: section 11 (federal rule 36) with its specific provision should govern the general provision of section 2 (federal rule 26).[398] This matter will only arise with respect to admissions since only *admissions* may be amended under the terms of section 11(2), and as such, if a duty to supplement an admission arises under section 2, the party should move to amend under section 11. On the other hand, if a request for admission is answered with a *denial* or otherwise, and a duty arises to supplement under section 2, the party may, and should do so under section 2 without moving to amend.[399] With respect to the use of admissions, a motion for summary judgment may be proper on an admission of dispositive facts obtained under section 11.[400]

In the federal courts under federal rule 36, to which section 11 corresponds, neither requests nor responses to requests are regarded as pleadings, but an admission under rule 36 may be used by a party adverse to the admitting party as if the admission appeared in the pleadings.[401] An admission may be introduced at trial, but a party may not use his own admission at trial because of the hearsay rule which requires that an adverse party offer the admission against the party who made it.[402]

All pertinent objections to the admissibility of admissions may be made at trial.[403] Even though an admission obtained under rule 36 conclusively establishes the matter with respect to the party who made it, "the admission should not bind the party who requested it," and the requesting party should be allowed to contradict the matters of the

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[397] *Id.* at 746.

[398] *Id.*

[399] *See id.*

[400] See notes 380 & 394 and accompanying text *supra*.

[401] 8 WRIGHT & MILLER § 2264, at 739.

[402] *Id.* at 741; *see* 4A MOORE ¶ 36.09, at 36-81.

[403] 4A MOORE ¶ 36.08, at 36-80; 8 WRIGHT & MILLER § 2264, at 741.

admission.[404] Similarly, admissions of a party do not bind a coparty.[405]

Section 11(2) specifies that any admission under this section is for the purpose of the pending action only and is not an admission by a party for any other purpose. An admission, therefore, may not be used against a party in any other proceeding.[406]

D. Failure to Admit—Sanctions

Failure to admit the matters in a request for admission will, in certain instances, carry with it the sanctions provided in section 12(3) of the Act. These sanctions are different from the two sanctions previously discussed: the automatic admission under section 11 itself where a party *fails to respond* within the time limits and the award of expenses on a motion testing the sufficiency of an answer or objection.[407] Section 12(3) provides:

> (3) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Section 11 of this act, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (a) the request was held objectionable under Section 11 (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (d) there was other good reason for the failure to admit.

The provision is clear on its face: if a party fails to *admit* the matter in a request for admission, and the proponent of the request subsequently proves the matter, the proponent may be entitled to expenses, including attorney's fees, incurred in the proof. The expenses will be awarded unless the court finds that the request was "objectionable," the matter was not "substantially important," the party who failed to admit had "reasonable ground" to believe he might prevail on the matter, or there was other "good reason" for the failure to admit. The mandatory

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[404] 8 WRIGHT & MILLER § 2264, at 746-47, *citing* Champlin v. Oklahoma Furniture Mfg. Co., 324 F.2d 74 (10th Cir. 1963).

[405] 8 WRIGHT & MILLER § 2264, at 747, *citing* United States v. Wheeler, 161 F. Supp. 193 (W.D. Ark. 1958).

[406] *See, e.g.*, Seay v. International Ass'n of Machinists, 360 F. Supp. 123 (C.D. Cal. 1973). *See also* 4A MOORE ¶ 36.08, at 36-79 to -80; 8 WRIGHT & MILLER § 2264, at 747.

[407] It should be reiterated that sanctions under section 12(3) apply only where there is a failure to *admit* and not where there is a failure to *respond*. See note 379 and accompanying text *supra*. *See generally* 8 WRIGHT & MILLER §§ 2265, at 747, 2290, at 801.

nature of this language should place the burden of avoiding the expense award on the party failing to admit.

This language is arguably full of loopholes and leeway, and the federal decisions should be examined for guidance.[408] "Objectionable" is fairly clear,[409] but "substantial importance" leaves some room for interpretation. For example, one federal court refused expenses where the cost of subsequent proof was negligible.[410] "Reasonable ground" and "good reason" also admit of interpretation and lead to the conclusion that the entire matter of award of expenses under section 12(3) is one of discretion, reversible only for abuse.[411] Section 12(3) provides that only a party served with a request may be liable for expenses and attorney's fees.[412]

Section 12(3) is applicable where there is a denial of the matter in the request including an answer in which the party states that the matter cannot be truthfully admitted or denied with reasons.[413] In regard to the interplay between motions to determine the sufficiency of an answer or objection to a request under section 11(1)(b) and section 12(3),

> the party seeking the requests has the option of going before the court to determine the effect of the answers, or of waiting until trial and testing their effect with a motion to award expenses.[414]

Procedurally, requests for admissions may be used anywhere necessary or desirable and without restriction of the number and detail of the requests served.[415] The technical form of the request should not be complex. The forms in use in the federal courts for requests under federal rule 36 should be adequate for state court practice, and if used would seem to engender a desirable uniformity between the state and federal practice.[416]

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[408] *E.g.*, O'Meara-Sterling v. Mitchell, 299 F.2d 401 (5th Cir. 1962); United States *ex rel.* Westinghouse Elec. Co. v. National Sur. Co., 25 F.R.D. 249 (E.D. Pa. 1960); *see* 4A MOORE ¶ 37.04, at 37-78; 8 WRIGHT & MILLER § 2290, at 801. *But see* Melanson Co. v. Hupp Corp., 391 F.2d 902 (3d Cir. 1968); Grogan v. United States, 341 F.2d 39 (6th Cir. 1965).

[409] See notes 364 through 370 and accompanying text *supra*.

[410] Bateman v. Standard Brands, Inc., 9 F.R.D. 555 (W.D. Mo. 1949), *cited in* 4A MOORE ¶ 37.04, at 37-81 n.13.

[411] 4A MOORE ¶ 37.04, at 37-82 to -83.

[412] *See id.* at 37-83.

[413] 4A MOORE ¶ 37.04, at 37-81. See note 203 *supra*.

[414] *See* 4A MOORE ¶ 37.04, at 37-81; notes 382 through 394 and accompanying text *supra* (determining the sufficiency of answers or objections to which sanctions under section 12(1)(d) apply).

[415] *See* 4A MOORE ¶ 36.04[7], at 36-48.

[416] From the federal practice,

> [r]equests for admission should not be made in the form of interrogatories. . . . Interrogatories seeking admissions may be objectionable in that Rule 33 does not include the language of Rule 36 protecting the party making the

XII. SECTION 12. FAILURE TO MAKE DISCOVERY: SANCTIONS

One of the most important provisions in the entire Act, section 12 is designed to facilitate and effectuate discovery by imposing a variety of sanctions and coercive measures on parties who fail to exercise good faith and promptness in making discovery. If given its proper role and if directed toward those illegitimate procrastinations which permeate practice, section 12 can serve to clear a court's docket, cut a client's costs, or eliminate many of the evils inherent in the "arena" concept of the courtroom. Most importantly, section 12 may properly serve as one of the most practical, forceful, and useful tools of pretrial justice —and ultimate justice—ever placed at the disposal of the county, circuit, and chancery courts. The theory of this Act, with its discovery provisions and mechanism for further reform in the Advisory Committee, is the facilitation of justice. A positive, rational use of section 12, as well as the entire Act, is absolutely necessary to put the theory into effect.

The trend in the federal courts with respect to similar sanctions under federal rule 37 perhaps has been one of reluctance to impose the sanctions.[417] The trend should be reversed in the federal courts where necessary, and the Mississippi courts should never allow it to develop. The duty falls on the judges not to countenance hedging from an attorney who fails in bad faith to make proper discovery. Most crucially, the judges themselves must be careful not to circumvent the statutory restraints in interpreting and using section 12.

With these matters in mind, and remembering the spirit of judicial reform embodied in the able men and women who sponsored and sought the adoption of the Act, and indeed, displayed by the Mississippi Supreme Court in *Newell v. State*,[418] section 12 must be considered.

A. Motion for Order Compelling Discovery—Expenses

(1) *Motion for order compelling discovery.* A party, upon reasonable notice to other parties and all persons affected thereby, may apply for

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admission against its use in other proceedings and for other purposes.

Id. ¶ 36.05[2], at 36-55 to -56.

For suggested forms, see Appendix II.

[417] 8 WRIGHT & MILLER § 2281, at 756 n.27, *quoting* W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 154-56 (1968):

> The rule-makers wrote a rule about sanctions, the learned judges interpreted the rule, and the authors of treatises codified all the cases and commentaries; but the lawyers and judges rarely evoke the rule, showing that law books and litigation are not the same.

See 4A MOORE ¶ 37.08, at 37-109.

[418] 308 So. 2d 71 (Miss. 1975).

an order compelling discovery as follows:

(a) *Appropriate court.* An application for an order may be made to the court in which the action is pending.

(b) *Motion.* If a deponent fails to answer a question propounded or submitted under Sections 6 or 7 of this act, or a corporation or other entity fails to make a designation under Section 6 (2) (f) or Section 7 (1) of this act, or a party fails to answer an interrogatory submitted under Section 9 of this act, or if a party, in response to a request for inspection submitted under Section 10 of this act, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Section 2 (3) of this act.

(c) *Evasive or incomplete answer.* For purposes of this subsection, an evasive or incomplete answer is to be treated as a failure to answer.

(d) *Award of expenses of motion.* (i) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

(ii) If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(iii) If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

The imposition of section 12 sanctions, within constitutional limits,[419] should be entrusted to the discretion of the trial judge.[420] The Fifth Circuit has given all judges the basic premise from which to apply such discretion: "overleniency is to be avoided where it results in inadequate

[419] *See* 8 WRIGHT & MILLER § 2283, at 759.

[420] Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970); *see* 4A MOORE ¶ 37.08, at 37-109; 8 WRIGHT & MILLER § 2284, at 764.

protection of discovery."[421] At the appellate level the ordinary standard of review should be "abuse of discretion," but in cases where the sanctions are drastic, such as dismissal or default, the sanctions should be examined closely in order to protect and encourage a trial on the merits.[422] The most drastic sanctions should be reserved for the most flagrant infractions, and discretion should be exercised "in a fashion intended to encourage discovery rather than simply to punish for failure to make discovery."[423]

A procedural problem that may cause delay in some cases is Mississippi's apparent lack of an orderly motion practice. Motions to compel discovery under section 12 will be required, in most cases, prior to a local term of court. This will necessarily involve delay where a judge is several counties away handling an already overloaded docket in another term of court. The greatest danger of delay and added expense will occur in depositions upon oral examination. Section 12 provides some relief from this problem by allowing the proponent in oral depositions to complete or adjourn the examination before he applies for an order compelling discovery.

This specific provision does little, however, to mitigate the cost involved of reassembling witnesses and parties where an examination is halted or even completed. It should be noted again that a deponent upon oral examination (or any party to discovery) may not object to a question relating to subject matter which the deponent believes will be inadmissible at trial.[424] The objection should be reserved for trial.[425]

If a deponent on oral or written examination refuses to answer a question, the proponent may move the court for an order compelling him to answer. Such a motion should be denied and expenses and fees awarded to the deponent if the proposed question goes beyond the general scope of discovery,[426] seeks information which is either privileged[427] or irrelevant to the subject matter, or improperly seeks "work product."[428] On the other hand, if the proposed question is relevant to the

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[421] Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1126 (5th Cir. 1970).

[422] 4A MOORE ¶ 37.08, at 37-112 to -113; 8 WRIGHT & MILLER § 2284, at 765; *see, e.g.*, Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970).

[423] 8 WRIGHT & MILLER § 2284, at 772, *citing* Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970).

[424] See section 2(2)(a) at part II *B supra*.

[425] *See* 4A MOORE ¶ 37.02(2), at 37-32.

[426] See part II; *see* 4A MOORE ¶ 37.02(2), at 37-32; 8 WRIGHT & MILLER § 2286, at 778.

[427] See part II *B supra*; *see* Johnstone v. Campbell, 23 F.R.D. 234 (D. Mass. 1959); McCarthy v. Benton, 13 F.R.D. 454 (D.D.C. 1952).

An erroneous compelling of disclosure of privileged information does not waive the privilege in the federal courts. *See* 8 WRIGHT & MILLER § 2286, at 781. *See generally* FED. R. EVIDENCE 501, 1101(c).

[428] See part II *D supra*; *cf.* Merriman v. Cities Serv. Gas. Co., 11 F.R.D. 584 (W.D.

subject matter and calculated to lead to the discovery of admissible evidence,[429] the motion to compel an answer should be granted, together with attendant expenses and fees.[430] The attorney, in deciding whether to pursue an order compelling discovery, will first have to determine if an objection accompanied by a refusal to answer is in the proper forum, and if so, whether the objection is reasonably grounded.[431] If not in the proper forum, or not reasonably grounded, a motion to compel an answer should be granted if the matter is critical.[432] A failure to *appear* at a deposition subjects a party to a different set of sanctions under the Act.[433] The award of expenses upon the motion is discussed later in this part of the article.[434]

The proponent of discovery is permitted to move for an order compelling a designation when a corporation or other entity under section 6(2)(f) or 7(1) fails to designate an officer or some other person to testify.[435] Expenses and fees may be awarded to the prevailing party. Failure of a designated officer or other person to respond to discovery subjects the party making the designation to different sanctions under the Act.[436]

Upon the failure of a party to answer interrogatories propounded under section 9, the proponent is permitted to move for an order compelling discovery and seek an award of expenses and fees. Interrogatories under section 9 must be objected to or answered. If a party fails to *answer*, section 12(1) should be applicable, and section 12(4)[437] sanctions may also be available.[438] If an objection alone is lodged against an inter-

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Mo. 1951).

[429] *See* Palma v. Lake Waukomis Dev. Co., 48 F.R.D. 366 (W.D. Mo. 1970).

[430] On motion, the court should rule on each question that the deponent has refused to answer. This does not limit the inquiry to the precise question that the deponent is ordered to answer; deponent must give full information on the subject matter of each question. 4A MOORE ¶ 37.02[9], at 37-42; *see, e.g.*, Falk v. United States, 53 F.R.D. 113 (D. Conn. 1971); Heldmann v. Johnson, 51 F.R.D. 3 (E.D. Wis. 1970); de Antonio v. Solomon, 41 F.R.D. 447 (D. Mass. 1966).

[431] See part VI *C*; text at notes 198 through 200 *supra*.

[432] One federal court has denied a motion to compel an answer where the court found that all the information relevant to the issues raised had been made available to the party seeking the order; the court noted that federal rule 37 does not specifically provide for compelling a witness to appear at a general deposition for the second time. Hampton v. Pennsylvania R.R., 30 F.R.D. 70 (E.D. Pa. 1962); *see* 4A MOORE ¶ 37.02[6], at 37-39; 8 WRIGHT & MILLER § 2286, at 780.

[433] See part XII *C infra*.

[434] See notes 445 through 456 and accompanying text *infra*.

[435] *See* 8 WRIGHT & MILLER §§ 2109-10, at 396-400.

[436] See part XII *C infra*.

[437] *Id.*

[438] See text accompanying notes 524 & 525 *infra*; *see* 4A MOORE ¶ 37.05, at 37-105 to -106.

rogatory, the only test of its validity appears to be procedure dealing with failing to *answer* under section 12(1) since section 12(4) only applies in instances of failing to respond (answer or object). If a party fails to answer or object, relief under both subsections could possibly be pursued.[439] Again, the proponent of the discovery will have to calculate the importance of the information sought before a motion for an order compelling an answer is made, since an award of expenses and fees against him is likely if the motion fails.[440]

If a party fails to comply with a request for inspection or production under section 10, or objects to such a request, the proponent of the request may move for an order under section 12(1) compelling inspection. If a party fails to respond at all to the request, the proponent may move for the imposition of sanctions under section 12(4).[441]

An evasive or incomplete answer is deemed by section 12(1)(c) to be a failure to answer for the above-mentioned purposes.[442]

If the motion for an order compelling discovery is denied, the court may issue a protective order pursuant to section 2(3) of the Act to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.[443] This gives the court a much broader discretion in protecting parties from abuse in motions under section 12(1).[444]

The provisions in section 12(1)(d) for the award of expenses and fees upon a motion to compel discovery should be a very effective safeguard against frivolous or haphazard motions as well as against frivolous and haphazard refusals to respond to discovery, including evasive answers. Even though expenses under federal rule 37, to which section 12 corresponds, have been reluctantly awarded,[445] such an award can play an important part in encouraging effective extrajudicial discovery[446] by eliminating "unjustified insistence upon or objection to discovery."[447]

The award of expenses and fees upon a motion is the general sanction for most motions under the Act.[448] Beyond applying to section 12(1)

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[439] *See generally* 4A MOORE ¶ 37.02[3], at 37-33 to -34.

[440] Examples of cases in which an answer was ordered include: DiGregorio v. First Rediscount Corp., 506 F.2d 781 (3d Cir. 1974); Chemical & Indus. Corp. v. Druffel, 301 F.2d 126 (6th Cir. 1962); Falk v. United States, 53 F.R.D. 113 (D. Conn. 1971); Rupp v. Vock & Weiderhold, Inc., 52 F.R.D. 111 (N.D. Ohio 1971).

[441] See note 527 and accompanying text *supra*; *see* 4A MOORE ¶ 37.02[4], at 37-35.

[442] *See* 4A MOORE ¶ 37.02[5], at 37-36.

[443] See part II *F supra*.

[444] 4A MOORE ¶ 37.02[8], at 37-42.

[445] *See* 8 WRIGHT & MILLER § 2288, at 786.

[446] The language of federal rule 37 is "intended to encourage wider use of award of expenses to discourage unnecessary recourse to the courts." 4A MOORE ¶ 37.02[10.—1], at 37-44.

[447] 8 WRIGHT & MILLER § 2288, at 786.

[448] *See id.* at 786-87.

motions to compel discovery, this sanction is expressly made applicable to a motion by a person under section 2(2)(c) to compel the disclosure of a previous statement by that person to the denial of a motion under section 2(3) for a protective order, to a motion under section 6(4) to terminate or limit examination upon deposition, and to a motion under section 11(1)(b) to determine the sufficiency of answers or objections to requests for admissions.

"The great operative principle of [section 12(1)(d)] is that the loser pays."[449] If the motion to compel discovery is granted, the party or deponent whose conduct necessitated the motion will be required to pay the moving party reasonable expenses plus attorney's fees incurred in obtaining the order.[450] If the motion is denied, the moving party will be required to pay the opposing party or deponent reasonable expenses plus attorney's fees.[451]

Unless the court finds that opposition to the motion or the making of it was substantially justified, or other circumstances make the award of expenses unjust, the award *shall* be made.[452] What is "substantial justification" must await specific instances for interpretation,[453] but it is clear from the mandatory nature of the sanction that "the burden of persuasion is now on the losing party to avoid assessment of expenses and fees . . . ."[454] The court may apportion the expenses among the parties if the motion is granted in part and denied in part.[455]

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[449] *Id.* at 787.

[450] Under federal rule 37(a) with respect to imposing the sanctions, *see, e.g.*, Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.), *cert. denied*, 409 U.S. 1039 (1972); Fisher v. Harris, Upham & Co., 61 F.R.D. 447 (S.D.N.Y. 1973); Allied Artists Pictures Corp. v. Giroux, 50 F.R.D. 151 (S.D.N.Y. 1970); Brunswick Corp. v. Chrysler Corp., 291 F. Supp. 118 (E.D. Wis. 1968).

[451] With respect to federal rule 37, *see, e.g.*, Unilectric, Inc. v. Holwin Corp., 243 F.2d 393 (7th Cir.), *cert. denied*, 355 U.S. 830 (1957); Whitehouse Inv. Ltd. v. Bernstein, 51 F.R.D. 163 (S.D.N.Y. 1970); Independent Prods. Corp. v. Loew's Inc., 27 F.R.D. 426 (S.D.N.Y. 1961).

[452] Federal rule 37 is similarly mandatory in nature. 8 WRIGHT & MILLER § 2288, at 789.

[453] *See, e.g.*, Stavrides v. Mellon Nat'l Bank & Trust Co., 60 F.R.D. 634 (W.D. Pa. 1973); Harlem River Consumers Cooperative Inc. v. Associated Grocers, Inc., 54 F.R.D. 551 (S.D.N.Y. 1972); Ballard v. Allegheny Airlines, Inc., 54 F.R.D. 67 (E.D. Pa. 1972); *see* 4A MOORE ¶ 37.02[10.—1], at 37-43.

> Making a motion, or opposing a motion, is "substantially justified" if the motion raised an issue about which reasonable men could genuinely differ on whether a party was bound to comply with a discovery rule. The mere fact that the party was acting in good faith is not substantial justification if there was no fairly litigable issue.

8 WRIGHT & MILLER § 2288, at 790.

[454] 8 WRIGHT & MILLER § 2288, at 789.

[455] *See* 4A MOORE ¶ 37.02[10.—3], at 37-15; *cf.* Whitehouse Inv. Ltd. v. Bernstein, 51 F.R.D. 163 (S.D.N.Y. 1970); Macrina v. Smith, 18 F.R.D. 254 (E.D. Pa. 1955).

An opportunity for hearing is required before expenses and fees are assessed. It should be emphasized that section 12(1)(d) provides that if the motion to compel discovery is granted, expenses and fees may be assessed against a *party or deponent* or a *party or attorney* advising the conduct which necessitated the motion or *both* of them; if the motion is denied, fees and expenses may be assessed against the moving party, the attorney advising the motion, or both.[456]

B. Failure to Comply with Order Providing or Permitting Discovery

It should be noted at the outset that section 12(2) which provides sanctions for failing to comply with an order providing or permitting discovery is divided into two parts: *Sanctions by the court* and *Sanctions by the court in which an action is pending.* Each part will be considered separately below, but several preliminary observations should be made about section 12(2) as a whole.

To be imposed, sanctions under section 12(2) require, first, an order by the court designed to provide or permit discovery, and second, a failure by a party or witness to obey that order.[457] Section 12(2) is expressly applicable to orders under section 12(1). In addition, these sanctions may be available in conjunction with the issuance of a protective order under section 2(3), or in conjunction with a motion and order under section 12(4) upon the failure of a party to attend his own deposition, serve answers to interrogatories, or respond to requests for inspection.[458] One must remember that "[t]he propriety of the discovery sought is not in issue at the time sanctions are being imposed. . . . That question will have been decided when the court ordered the discovery."[459]

Recent federal decisions have held there must be some element of "willfulness" in a refusal to obey an order for discovery before sanctions are imposed. For example, the sanction of default judgment should be sustainable only "if it has been demonstrated that the [party's] failure to comply was in fact due to willfulness, bad faith or fault and not to

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[456] Attorneys have been assessed with expenses under federal rule 37. *See, e.g.*, Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965); Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963); Osolin v. S.S. Colorado, 1 FED. RULES SERV. 2d 37a.22, Case 1 (N.D. Cal. 1958).

Expenses were imposed on both defendants and their counsel in Palma v. Lake Waukomis Dev. Co., 48 F.R.D. 366 (W.D. Mo. 1970).

[457] *E.g.*, Britt v. Corporacion Peruana De Vapores, 506 F.2d 927 (5th Cir. 1975); *see* 4A MOORE ¶ 37.03, at 37-48; 8 WRIGHT & MILLER § 2289, at 790.

[458] *See* 4A MOORE ¶ 37.03[2.—1], at 37-50.

[459] 8 WRIGHT & MILLER § 2289, at 790-91. If sanctions are imposed under federal rule 37(b), an appellate court, in considering the sanction order, may consider the propriety of the prior order for discovery. *Id.* at 791.

any inability to comply."[460] This holding is in accord with the Supreme Court's decision in *Societe Internationale Pour Participationes Industrielles & Commerciales, S.A. v. Rogers*,[461] which has, together with another decision,[462] indicated that sanctions such as dismissal or default which dispose of the merits of a case require willful disobedience, and that "the court should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior."[463]

Section 12(2) contemplates the imposition of direct sanctions only against the party or person who failed to obey an order. Thus, a party cannot be punished for a third party's disobedience.[464]

1. Sanctions by Court

> 12(2)(a). *Sanctions by court.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

The function of this subsection is clear on its face and needs little discussion. There is, however, a procedural matter that may cause some confusion with respect to imposing the sanction.

If a party-deponent fails to obey an order directing him to answer, section 12(2)(a) should apply, as well as section 12(2)(b). The problem arises in the case of a nonparty-deponent who is not subject to the jurisdiction of the court in which the action is pending. A nonparty-deponent who is served with a subpoena is of course subject to the sanctions, but if an out-of-state, nonparty-deponent voluntarily appears, his answers are indeed voluntary, and there may be no way in which to compel an answer from him or hold him in contempt if he disobeys the order.

Unlike the federal rules,[465] section 12(2)(a) does not specify which

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[460] Flaks v. Koegel, 504 F.2d 702, 709 (2d. Cir. 1974); *see, e.g.*, DiGregorio v. First Rediscount Corp., 506 F.2d 781 (3d Cir. 1974); Patterson v. C.I.T. Corp., 352 F.2d 333 (10th Cir. 1965).

[461] 357 U.S. 197 (1958). No design need be shown, however, to disobey the rule. *Id.; see* 4A MOORE ¶ 37.03[2.—1], at 37-52.

[462] Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909).

[463] 4A MOORE ¶ 37.03[2.—1], at 37-56. Professor Moore indicates that a willful refusal is only required in cases of imposition of the sanctions of dismissal or default. *See* 4A MOORE ¶ 37.05, at 37-91. However, the cases indicate that some element of willfullness is required for most of the sanctions. See notes 472, 475, 476, 478 & 487 and accompanying text *infra*.

[464] *See* 4A MOORE ¶ 37.03[2.—1], at 37-56, *citing* Goodyear Tire Co. v. Lyster, 328 F.2d 411 (5th Cir. 1964).

[465] Federal rule 37(b)(1) differs from section 12(2)(a) of the Act. The federal rule provides that the court in the district in which the deposition is being taken should order

court should order the sanction, but it is apparent the court in which the action is pending would be the proper court in cases of party-deponents and nonparty-deponents subject to the jurisdiction of the court.[466] The contempt sanction, like other sanctions, should be entrusted to the discretion of the court.[467]

2. Sanctions by Court in which Action is Pending

> 12(2)(b). *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Section 6 (2) (f) or Section 7 (1) of this act to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection (1) of this section, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (i) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claims of the party obtaining the order;
>
> (ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (iv) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure

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the answer and impose the sanctions; federal rule 37(a)(1) provides that with respect to orders compelling discovery, an order may be obtained from the court in which the action is pending, or from the court in the district in which the deposition is being taken, or in the case of nonparty deponents, only from the court in the district in which the deposition is being taken. In the federal courts, the nonparty deponent usually appears pursuant to a subpoena issued under federal rule 45, and federal rule 45(f) provides for contempt where the subpoena is disobeyed. *See* 4A MOORE ¶ 37.03[1], at 37-48.

[466] See generally section 6(1) of the Act. For a failure to serve a subpoena, see section 6(7)(b).

[467] See notes 420 through 421 and accompanying text *supra*. Examples of the use of contempt as a sanction include: United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974); Lincoln Lab., Inc. v. Savage Lab., Inc., 27 F.R.D. 476 (D. Del. 1961). Instances in which contempt was not found proper include: LaChance v. Service Trucking Co., 215 F. Supp. 159 (D. Md. 1963); Shawmut, Inc. v. American Viscose Corp., 11 F.R.D. 562 (S.D.N.Y. 1951).

was substantially justified or that other circumstances make an award of expenses unjust.

As under the preceeding provision, section 12(2)(b) requires a court order designed to provide or permit discovery and a failure to comply with that order before the sanctions are imposed. The sanctions under this subsection apply only to a party's failure to obey an order for discovery, or a similar failure by one designated to testify for a party.

The eight sanctions provided in subsections (i) to (iv) are not exclusive, mutually or otherwise, but are illustrative.[468] In addition to the sanctions expressly provided in the provision, the court in which the action is pending has the authority to make "such orders in regard to the failure as are just." This language makes certain that the enumerated sanctions are not exclusive, and it gives the court the authority to mold, within reason,[469] appropriate and just sanctions to the particular circumstances of a case.

The court should be able to impose more than one of the enumerated sanctions at a time, in addition to any other orders it deems just.[470] The first of these specific sanctions empowers the court to order certain matters to be taken as established in favor of the claim of the party obtaining the order upon the failure of the other party to comply with the order.[471] This sanction has been held improper in the federal courts where there were no elements of willful failure.[472] This sanction, if imposed with regard to dispositive matters, may lead to a motion for summary judgment.[473]

The second of the enumerated sanctions provides for disallowing claims or defenses of the disobedient party, or precluding him from introducing certain matters into evidence.[474] Willful disobedience or bad

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[468] *See* 4A MOORE ¶ 37.03[2.—2], at 37-57; 8 WRIGHT & MILLER § 2289, at 791.

[469] *See* 4A MOORE ¶ 37.03[2.—2], at 37-58.

[470] *See* 8 WRIGHT & MILLER § 2289, at 791, *citing* R. de Bouard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D. Tex. 1969).

[471] *See* 4A MOORE ¶ 37.03[2.—3], at 37-58; 8 WRIGHT & MILLER § 2289, at 792-93. This sanction has been regularly used in the federal courts. *E.g.*, Campbell v. Eastland, 307 F.2d 478, 491-92 (5th Cir. 1962); Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 873 (D.D.C. 1973); Kahn v. Sec'y of HEW, 53 F.R.D. 241, 245 (D. Mass. 1971); Philadelphia Housing Authority v. American Radiator & Std. Sanitary Corp., 50 F.R.D. 13, 19 (E.D. Pa. 1970), *aff'd*, 438 F.2d 1187 (3d Cir. 1971).

[472] See notes 461 through 463 and accompanying text *supra*. *E.g.*, Campbell v. Johnson, 101 F. Supp. 705, 706-07 (S.D.N.Y. 1951).

[473] *See* 4A MOORE ¶ 37.03[2.—3], at 37-59.

[474] *See id.* ¶ 37.03[2.—4], at 37-61; 8 WRIGHT & MILLER § 2289, at 793. Claims or defenses have been precluded in the federal courts. *E.g.*, Fisher v. Underwriters at Lloyd's London, 115 F.2d 641, 646 (7th Cir. 1940); Metropolitan Greetings, Inc. v. Michael McDonough, Inc., 60 F.R.D. 58, 61 (E.D. Pa. 1973); R. de Bouard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1, 2-3 (S.D. Tex. 1969).

faith should be shown,[475] and in its absence, one federal court has required gross indifference, deliberate callousness, or intended negligence before a party may be precluded from establishing a claim or defense.[476] This sanction is not limited to nondispositive issues.[477] It has been held error for a federal court to exclude depositions from evidence when it was physically impossible for the party to obtain the required answers.[478] This sanction, as well as all sanctions under section 12(2)(b), applies to a *party's* failure to comply with an order. Accordingly, the Fifth Circuit has held that the failure of a witness, who was an employee of a party, to answer a question did not preclude use of the deposition.[479] For this sanction to be applicable, again there must be an order and a failure to comply with the order.[480]

The third provision enumerated under section 12(2)(b) actually contains four specific sanctions. These four sanctions are not mutually exclusive,[481] and a court should be able to order them in combination, as well as any other sanctions deemed just and appropriate. There must be an order and a failure to obey that order before the sanctions are applicable.

The first of the four sanctions under the third provision is an order striking out all or part of the pleadings.[482] Under federal rule 37, this particular sanction

> was no doubt included to lend some flexibility to [the sanctions of dismissal and default] by permitting the court to strike out particular claims or defenses. . . . [However,] the court may entertain a motion for dismissal or default judgment without going through the waste motion of striking the pleadings.[483]

The introduction of evidence has likewise been precluded. *E.g.*, Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182, 1186 (N.D. Cal. 1973); Iaconelli v. Anchor Lines, Ltd., 51 F.R.D. 144, 147 (E.D. Pa. 1970); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912, 921 (S.D.N.Y. 1969).

[475] Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 861-62 (5th Cir. 1970); notes 461 through 463 and accompanying text *supra*.

[476] Campbell v. Johnson, 101 F. Supp. 705, 707 (S.D.N.Y. 1951); *see* 4A MOORE ¶ 37.03[2.—4], at 37-62.

[477] Philadelphia Housing Authority v. American Radiator & Std. Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd*, 438 F.2d 1187 (3d Cir. 1971).

[478] B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411 (5th Cir. 1964).

[479] *Id.* at 415-16; 4A MOORE ¶ 37.03[2.—4], at 37-62.

[480] Wembley, Inc. v. Diplomat Tie Co., 216 F. Supp. 565, 572 (D. Md. 1963); 4A MOORE ¶ 37.03 [2.—4], at 37-62; note 457 *supra*.

[481] See note 468 and accompanying text *supra*.

[482] *See* 4A MOORE ¶ 37.03[2.—5], at 37-63; 8 WRIGHT & MILLER § 2289, at 795.

[483] 4A MOORE ¶ 37.03[2.—5], at 37-71 to -72. *But cf.* Valenstein v. Bayonne Bolt Corp., 6 F.R.D. 353, 365-66 (E.D.N.Y. 1946). For an example of striking an answer followed by default judgment, see Marriott Homes, Inc. v. Hanson, 50 F.R.D. 396, 399 (W.D. Mo. 1970).

Accordingly, the motion for a sanction might seek an order striking the answer and entering judgment by default,[484] even though striking the answer might not be necessary. This sanction has been used in the federal courts to some extent,[485] but one court has characterized the sanction as harsh, and has suggested it be used sparingly.[486] To warrant this sanction the disobedience should be willful.[487]

The second sanction under the third provision is an order staying the proceedings.[488] A stay order under this provision would not be so much a penalty as a means of gaining compliance with the order compelling discovery.[489] Here also, disobedience of the order should be willful.[490]

The third sanction in the third provision is an order dismissing the entire action or any part of it.[491] This sanction, together with default judgment,[492] is one of the harsher restraints available in the court's discretion under the Act. A dismissal under the corresponding provision in federal rule 37 is an adjudication on the merits,[493] and consequently, res judicata.[494] Perhaps more so than other sanctions, elements of willful disobedience or conscious disregard of the order are required before the sanction of dismissal is imposed.[495] Dismissal would apparently be improper when noncompliance resulted after good faith efforts to com-

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[484] 4A MOORE ¶ 37.03[2.—5], at 37-72 n.14.

[485] *E.g.*, Flaks v. Koegel, 504 F.2d 702, 707 (2d Cir. 1974); Kahn v. Sec'y of HEW, 53 F.R.D. 241, 245-46 (D. Mass. 1971).

[486] United States v. One 1964 Cadillac Coupe De Ville, 41 F.R.D. 352, 354 (S.D.N.Y. 1966).

[487] *Id.*; see notes 461 through 463 and accompanying text *supra*.

[488] *See* 4A MOORE ¶ 37.03[2.—5], at 37-72 to -73; 8 WRIGHT & MILLER § 2289, at 795.

[489] *See* 4A MOORE ¶ 37.03[2.—5], at 37-72. This sanction would be effective in this manner when the disobedient party is the plaintiff, but would not be as effective when the defendant fails to comply. *Id.* at 37-72 to -73; *see, e.g.*, Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302 (S.D.N.Y. 1958).

[490] See notes 461 through 463 and accompanying text *supra*.

[491] *See* 4A MOORE ¶ 37.03[2.—5], at 37-64 to -70; 8 WRIGHT & MILLER § 2289, at 796-98.

[492] See notes 500 through 502 and accompanying text *infra*.

[493] Stebbins v. State Farm Mut. Auto. Ins. Co., 413 F.2d 1100 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 895 (1969), *cited in* 4A MOORE ¶ 37.03[2.—5], at 37-70 n.5.

Such dismissal can be made with the conditions that it is not to be taken as a judgment on the merits and that dismissal is without prejudice. Marshall v. Southern Farm Bureau Cas. Co., 353 F.2d 737 (5th Cir. 1965), *cert. denied*, 384 U.S. 910 (1966).

A dismissal with prejudice is an extreme measure. *See* Independent Prod. Corp. v. Loew's, Inc., 283 F.2d 730 (2d Cir. 1960). The sanction, however, has been used. *E.g.*, Daiflon, Inc. v. Allied Chem. Corp., 64 F.R.D. 690 (W.D. Okla. 1974).

[494] 4A MOORE ¶ 37.03[2.—5], at 37-64 n.1.

[495] See notes 461 through 463 and accompanying text *supra*; *see* Hinson v. Michigan Mut. Liab. Co., 275 F.2d 537 (5th Cir. 1960).

ply.[496] Before the sanction becomes available, there must be an order to permit, provide, or compel discovery, and a failure to comply with the order.[497] Recent federal cases imposing the sanction of dismissal have involved *multiple* instances of unjustified conduct.[498] Partial dismissal may be ordered in a case where total dismissal is not appropriate.[499]

Default judgment, the fourth specific sanction under the third provision, requires many of the same considerations involved in the sanction of dismissal.[500] There must be something more than inability to comply with an order before a default judgment is proper,[501] and multiple instances of disobedience are again suggested as part of the standard.[502]

The fourth enumerated sanction under section 12(2)(b) is contempt. This provision authorizes the court to cite a party with contempt in lieu of or in addition to any of the other sanctions.[503] Contempt sanctions have been used only rarely by the federal courts[504] since other sanctions have proved satisfactory.[505]

The last paragraph of section 12(2)(b) provides that in lieu of or in addition to the other sanctions, the court *shall* require the disobedient party, his attorney or both of them to pay expenses and attorney's fees resulting from the failure to obey the order.[506] This sanction should be imposed in most cases unless the court finds that the failure was substantially justified or that other circumstances make the sanction un-

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[496] *See* Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974); Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 859 (1968); 4A MOORE ¶¶ 37.03[2.—1], at 37-52, 37.03[2.—5], at 37-69 to -70.

[497] *See* United States v. Mensik, 381 F. Supp. 672 (N.D. Ill. 1974).

[498] *E.g.*, DiGregorio v. First Rediscount Corp., 506 F.2d 781, 785-89 (3d Cir. 1974); Daiflon, Inc. v. Allied Chem. Corp., 64 F.R.D. 690, 692 (W.D. Okla. 1974); Philpot v. Philco-Ford Corp., 63 F.R.D. 672, 674-75 (E.D. Pa. 1974).

[499] Harlem Book Co. v. Hurtt, 31 F.R.D. 177, 178-79 (E.D. Mo. 1962).

[500] *See* 4A MOORE ¶ 37.03[2.—5], at 37-67 to -68 & n.2.

[501] See notes 461 through 463 and accompanying text *supra*; *see* Flaks v. Koegel, 504 F.2d 702, 709 (2d Cir. 1974); Read v. Ulmer, 308 F.2d 915, 918 (5th Cir. 1962).

[502] *See* Rothberg v. National Banner Corp., 13 FED. RULES SERV. 2d 37d.33, Case 2 (E.D. Pa. 1969).

Cases in which the sanction has been imposed include: Norman v. Young, 422 F.2d 470 (10th Cir. 1970); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967); Trans World Airlines v. Hughes, 332 F.2d 602 (2d Cir. 1964); Thomas v. United States, 384 F. Supp. 224 (N.D. Tex. 1974).

[503] *See* 4A MOORE ¶ 37.03[2.—6], at 37-73; 8 WRIGHT & MILLER § 2289, at 799.

[504] *E.g.*, United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974); Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968); United States v. Hemphill, 369 F.2d 539 (4th Cir. 966).

[505] 4A MOORE ¶ 37.03[2.—6], at 37-75.

[506] *See id.* ¶ 37.03[2.—7], at 37-77; 8 WRIGHT & MILLER § 2289, at 791-92. Expenses have been awarded. *E.g.*, R. de Bouard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D. Tex. 1969).

just. Since this provision involves a failure to obey an order to provide or permit discovery, it is conceivable that a disobedient party could be liable for expenses incurred in obtaining the order under section 12(1)(d)[507] and for expenses under this section for failing to obey the order. Substantial justification is a matter for interpretation,[508] and a hearing should be necessary before imposition of expense liability.[509] In light of the mandatory nature of the provision, the disobedient party should have the burden of persuasion to avoid assessment of expenses and fees.[510]

Section 12(3) allows the award of expenses of proof upon the failure of a party to admit the genuineness of any document or the truth of any matter contained in a request for admission under section 11 of the Act.[511]

C. *Failure of Party to Attend His Deposition or Serve Answers to Interrogatories or Requests for Inspection*

> 12 (4) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Sections 6 (2) (f) or 7 (1) of this act to testify on behalf of a party fails (a) to appear before the officer who is to take his deposition, after being served with a proper notice, or (b) to serve answers or objections to interrogatories submitted under Section 9 of this act, after proper service of the interrogatories, or (c) to serve a written response to a request for inspection submitted under Section 10 of this act, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (i), (ii) and (iii) of subsection (2) (b) of this section. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order under Section 2 (3).

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[507] See notes 449 through 454 and accompanying text *supra*.

[508] See note 453 and accompanying text *supra*.

[509] This provision of section 12(2)(b) of the Act does not expressly provide for an opportunity for a hearing as does section 12(1)(d), but some sort of hearing will be necessary to enable the court to find any substantial justification for failure to obey an order.

[510] See note 454 and accompanying text *supra*.

[511] See part XI *D supra*.

Section 12(4) provides sanctions for cases in which a party, a party's agent, or one designated to testify for a party has disregarded the obligations to make discovery placed on him under sections 6, 7, 9, and 10 of the Act.[512] The sanctions under this subsection include those which are just, and those listed under section 12(2)(b)(i) to (iii).[513] No court order is required before a court, on *motion* of the party seeking discovery, can impose the sanction for a failure under section 12(4). "It is enough that a notice of the taking of a deposition or a set of interrogatories or a request for inspection has been properly served on the party."[514]

Section 12(4) is interrelated with the sanctions under sections 12(1) and 12(2),[515] but section 12(4) serves a specific role in the discovery process apart from other related sanctions:

> [Section 12(4)] makes it explicit that a party properly served has an absolute duty to respond, that is, to present himself for the taking of his deposition, or serve answers or objections to interrogatories served upon him, or serve a response to requests for discovery under [section 10] . . . and that the court in which the action is pending may enforce this duty by imposing sanctions for its violation. [Section 12(4)] deals, then, with the failure to make the initial response required by [sections 6, 7, 9, and 10], while [section 12(1)] and [section 12(2)] provide a method of resolving differences between the parties and enforcing the court's determination.[516]

Willful failure to make discovery apparently should not be required before imposition of the sanctions under 12(4);[517] thus, any failure proscribed by the subsection would permit sanctions.[518] The court should, however, take elements of willful failure into consideration in determining which sanctions to impose.[519] A coparty should not be subject to

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[512] *See* 4A MOORE ¶ 37.05, at 37-85; 8 WRIGHT & MILLER § 2291, at 807.

[513] See part XII *B*(2) *supra*.

[514] 8 WRIGHT & MILLER § 2291, at 807; *see* 4A MOORE ¶ 37.05, at 37-97.

[515] See notes 458, 465 & 466 and accompanying text *supra*.

[516] 4A MOORE ¶ 37.05, at 37-90. Professor Moore very adequately summarizes the entire discovery process under the federal rules in this part of his work and concludes with a reference to federal rule 37(d), to which section 12(4) corresponds:

> [I]f the party from whom discovery is sought complies with the rule in question by making the initial response, he has a right to refuse discovery until compelled by court order, subject to the expense of determining the justification of his refusal, but if he does not comply with the rule, he is subject to the sanctions set forth in Rule 37(d).

Id.; see id. at 37-106.

[517] *But see* Henry v. First Nat'l Bank, 50 F.R.D. 251 (N.D. Miss. 1970), *vacated on other grounds*, 444 F.2d 1300 (5th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972).

[518] *See* 4A MOORE ¶ 37.05, at 37-95; 8 WRIGHT & MILLER § 2291, at 812.

[519] 4A MOORE ¶ 37.05, at 37-95; *see* Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir.), *cert. denied*, 400 U.S. 878 (1970), *rehearing denied*, 400 U.S. 1025 (1971); Planning & Inv. Co., S.A. v. Hemlock, 50 F.R.D. 48 (S.D.N.Y. 1970).

sanctions upon the failure of another party.[520]

What constitutes proscribed failure under section 12(4) may, in the less than obvious case, cause problems of interpretation. For example, failure of a party to "appear" at his deposition, which literally is proscribed conduct, has not been literally interpreted by one federal court which held that even though a party appeared at the place of the deposition, his failure to be sworn constituted a sufficient failure to warrant imposition of the sanction under federal rule 37(d), to which section 12(4) corresponds.[521] A refusal to continue with a deposition after adjournment has been held a failure within rule 37(d),[522] but where the deposition was to be continued at a time that could not be construed to be within the terms of the notice, sanctions were improper.[523]

In regard to interrogatories, a serious or total failure to respond should invoke application of section 12(4).[524] The remedy for a partial response to interrogatories would be a motion for an order compelling discovery under section 12(1),[525] and if the response is evasive or incomplete, section 12(1)(c) should control.[526]

Section 12(4) applies to a failure to serve a written response after proper service of a request for inspection of documents under section 10. A written response precludes application of the sanctions under section 12(4), and a motion under section 12(1) to compel discovery would be the proper remedy to a response thought insufficient.[527]

The sanctions available for a failure under section 12(4) include: "such orders in regard to the failure that are just;"[528] an order that the matters in question or any other designated facts should be taken as established for the purposes of the action in accordance with the claims of the nondisobedient party, section 12(2)(b)(i);[529] an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence, section 12(2)(b)(ii);[530] an order striking out pleadings or parts

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[520] 4A MOORE ¶ 37.05, at 37-100.

[521] Bourne, Inc. v. Romero, 23 F.R.D. 292 (E.D. La. 1959).

[522] *See* Fong v. United States, 300 F.2d 400 (9th Cir. 1962).

[523] Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969).

[524] *See* 4A MOORE ¶ 37.05, at 37-102, 37-106; 8 WRIGHT & MILLER § 2291, at 809.

[525] *See* 4A MOORE ¶ 37.05, at 37-105; notes 437 through 440 and accompanying text *supra*.

[526] See note 442 and accompanying text *supra*. *See* 4A MOORE ¶ 37.05, at 37-103.

[527] See note 441 and accompanying text *supra*.

[528] This provision should allow the court to mold the remedy to the wrong. See note 469 and accompanying text *supra*; *see* 4A MOORE ¶ 37.05, at 37-99.

[529] *E.g.*, Kahn v. Sec'y of HEW, 53 F.R.D. 241 (D. Mass. 1971). See notes 471 through 473 and accompanying text *supra*.

[530] *E.g.*, Coalition of Black Leadership v. Doorley, 349 F. Supp. 127 (D.R.I. 1972). See notes 474 through 479 and accompanying text *supra*.

thereof, section 12(2)(b)(2)(iii);[531] an order staying further proceedings, section 12(2)(b)(iii);[532] an order dismissing the action or proceeding or any party thereof, section 12(2)(b)(iii);[533] and an order rendering default judgment against the disobedient party, section 12(2)(b)(iii).[534] Contempt is not specifically provided as a sanction, but it could be administered in the proper case as a "just" order.

In lieu of or in addition to any order issued under section 12(4), the court is authorized to require the disobedient party, his attorney or both to pay the reasonable expense and attorneys' fees caused by the failure. The provision for award of expenses should be mandatory unless the court finds that the failure was substantially justified or that other circumstances make an award unjust.[535]

Finally, section 12(4) provides that a failure to act may not be excused on grounds that the discovery sought is objectionable unless a protective order has been sought under section 2(3).[536]

D. Appeal of Order

Appeals of orders under section 12 as a whole present a separate issue for consideration. The orders available under section 12 include: one compelling discovery together with expenses, contempt of a deponent, taking certain facts as established, precluding a claim or defense, prohibiting certain evidence, striking the pleadings, staying the proceedings, dismissing the action, rendering default judgment, contempt in general, and expense and fee awards. Thus, the question arises: Which of these orders are appealable?

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[531] *E.g.*, Kahn v. Sec'y of HEW, 53 F.R.D. 241 (D. Mass. 1971). See notes 482 through 487 and accompanying text *supra*.

[532] *E.g.*, Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302 (S.D.N.Y. 1958). See notes 488 through 490 and accompanying text *supra*.

[533] *E.g.*, Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971); Cabales v. United States, 447 F.2d 1358 (2d Cir. 1971); Foss v. Gerstein, 58 F.R.D. 627 (S.D. Fla. 1973).

Dismissal was refused in Henry v. First Nat'l Bank, 50 F.R.D. 251 (N.D. Miss. 1970), *vacated on other grounds*, 444 F.2d 1300 (5th Cir. 1971), *cert. denied*, 405 U.S. 1019 (1972).

Dismissal was held error in Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified*, 456 F.2d 835 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972). See notes 491 through 499 and accompanying text *supra*.

[534] *E.g.*, Seanor v. Bair Transp. Co., 54 F.R.D. 35 (E.D. Pa. 1971); Marriott Homes, Inc. v. Hanson, 50 F.R.D. 396 (W.D. Mo. 1970). See notes 500 through 502 and accompanying text *supra*.

[535] *E.g.*, Hunter v. International Sys. & Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972). This provision is virtually the same in section 12(1)(d). See notes 445 through 454 & 456 and accompanying text *supra*.

[536] *See* Philadelphia Housing Authority v. American Radiator & Std. Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970); 8 WRIGHT & MILLER § 2291, at 810-11. See part II *F supra*.

If a generalization must be made in regard to appeals to the Mississippi Supreme Court, it must be that only final judgments in circuit and final decrees in chancery, neither being by confession or consent, are appealable.[537]

There is one statutory exception to this general rule: a chancellor has the power in his discretion to grant an appeal in term or vacation from any interlocutory order or decree under which money is required to be paid, the possession of property changed, where he feels an appeal would be proper to settle a cause, or in exceptional cases to avoid expense and delay.[538] The chancellor may allow the appeal, or it can be allowed by a supreme court justice.[539] This statutory provision does not apply to the circuit courts.[540] This statute has been strictly interpreted,[541] and an *interlocutory* appeal from chancery court, in apparent contradiction to its definition, will not lie unless it will settle all of the controlling principles involved in the cause.[542] However, if costs and delay may be avoided through an interlocutory appeal, the appeal should lie,[543] but all procedural questions are not within the statute even if expense and delay might be avoided.[544] For example, an appeal will not lie from an order which permits a party to examine the books of his adversary.[545] With this interpretation, most interlocutory orders in chancery under section 12 will not be appealable under the statute.

The statute does lend itself to interpretation, however, and the instances in which the statute allows an appeal from an interlocutory order in chancery are listed in the disjunctive: "An appeal may . . . be granted . . . from any interlocutory order or decree whereby money is required to be paid, or the possession of property changed . . . ."[546] This language may permit an interlocutory appeal from *any* order coupled with an award of expenses under section 12;[547] however, such an appeal could be interpreted as retarding the same procedural expedition which

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[537] MISS. CODE ANN. § 11-51-3 (1972); *see* Moore, *Appeals to Supreme Court*, in CIRCUIT COURT PRACTICE 251 (Mississippi Law Institute 1966).

[538] MISS. CODE ANN. § 11-51-7 (1972); see V. GRIFFITH, *supra* note 312, §§ 680-84, at 753-61.

[539] MISS. CODE ANN. § 11-51-7 (1972); *see* Farrar v. Phares, 232 Miss. 391, 99 So. 2d 594 (1958).

[540] State Tax Comm'n v. Clinton, 267 So. 2d 312 (Miss. 1972).

[541] *E.g.*, Seaney v. Seaney, 218 So. 2d 5 (Miss. 1969). *But see* State v. Woodruff, 170 Miss. 744, 150 So. 760 (1933).

[542] *E.g.*, Nash v. Winter, 235 Miss. 330, 109 So. 2d 336 (1959).

[543] *See* Ward v. Whitfield, 64 Miss. 754, 2 So. 493 (1887).

[544] Universal Life Ins. Co. v. Keller, 197 Miss. 1, 17 So. 2d 797 (1944); *see* Stirling v. Whitney Nat'l Bank, 170 Miss. 674, 150 So. 654 (1933).

[545] Equitable Assurance Soc'y v. Clark, 76 Miss. 22, 28 So. 798 (1900).

[546] MISS. CODE ANN. § 11-51-7 (1972).

[547] *See* Lewis v. Miller, 21 Miss. 110 (1849).

the Act seeks to obtain. Dismissal, default, and contempt are treated separately below.[548]

Interlocutory appeals in circuit court, on the other hand, present more of a problem under the existing statutory scheme. Under the general statute,[549]

> [a]n appeal may be taken to the Supreme Court from any final judgment of the circuit court in a civil case, but there is no interlocutory appeal from a judgment of the circuit court, except from an order for a new trial based on excessiveness or inadequacy of damages. A judgment of the circuit court is not final if it does not settle the cause with respect to all of the parties, or when it does not finally dispose of all the issues presented.[550]

An interlocutory order may be an assignment of error and grounds for reversal on appeal, but the supreme court has no jurisdiction to consider the order on appeal until a final judgment has been entered in the court below.[551]

Dismissal, default, and contempt sanction orders in chancery and circuit, however, are appealable under the present statutory interpretation.[552] Dismissal of a case without prejudice has been held in Mississippi to be a final judgment from which an appeal may be taken,[553] and dismissal with prejudice is definitely appealable as a final judgment.[554] Default judgment in circuit may be appealed indirectly, by making a motion to vacate the judgment and then appealing a denial of the motion.[555] A contempt citation of any person by any court is subject to appeal by statute,[556] and on appeal, the supreme court will decide the issue.[557]

Additionally, there may be some authority for appealing an order

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[548] See notes 553 through 558 and accompanying text *infra*.

[549] MISS. CODE ANN. § 11-51-3 (1972).

[550] State Tax Comm'n v. Clinton, 267 So. 2d 312, 314 (Miss. 1972); *see* Lotterhos, *Practice and Procedure on Appeals in the Supreme Court of Mississippi*, 30 MISS. L.J. 470 (1959). The appeal from an order granting a new trial based on excessiveness or inadequacy of damages is allowed by MISS. CODE ANN. § 11-7-213 (1972).

[551] Moore, *supra* note 537, at 253.

[552] *See, e.g.*, Roach v. Black Creek Drainage Dist., 206 Miss. 794, 41 So. 2d 5 (1949).

[553] First Nat'l Bank v. Graham, 242 Miss. 879, 137 So. 2d 193 (1962); Solomon v. Continental Baking Co., 174 Miss. 890, 165 So. 607 (1936); *see* Lotterhos, *supra* note 550, at 472-73; *cf.* Hattiesburg Butane Gas Co. v. Griffin, 206 So. 2d 845 (Miss. 1968); Mid-South Paving Co. v. State Highway Comm'n, 197 Miss. 751, 20 So. 2d 834 (1945).

[554] *See* Mitchell v. Film Transit Co., 194 Miss. 550, 13 So. 2d 154 (1943).

[555] *In re* Hollensbee's Estate, 218 Miss. 700, 67 So. 2d 275, 389, 709 (1955), *cited in* Moore, *supra* note 537, at 255 n.15.

[556] MISS. CODE ANN. § 11-51-11 (1972).

[557] Evers v. State, 241 Miss. 560, 131 So. 2d 653 (1961).

striking pleadings.[558] If essential parts of the pleadings are struck, a resulting demurrer type judgment might be subject to appeal.

Appeals from the law side of county court are made to circuit court and those from the equity side to chancery court. The statute regulating this procedure provides no appeals or certiorari may be taken from any interlocutory order of the county court.[559] This provision, then, precludes appeal of an interlocutory county court order under section 12, except that dismissals and default judgments would apparently be final judgments and thus appealable, much the same as in the chancery and circuit courts.[560] The contempt statute likewise applies to county court and makes contempt orders in that court appealable.[561]

Absent dismissal, default judgment, or contempt, there is no effective procedure for determining whether an order under section 12 may be appealed, short of attempting an appeal. The supreme court, faced with such an attempt, would apparently be bound by the statutes,[562] and without further interpretation, the statutes foreclose most appeals from interlocutory sanction orders. Clarification by the Advisory Committee of this appellate process is necessary.

XIII. Section 13. Method of Service

> *Section 13. Method of service.* Any notice, petition, motion, order, written interrogatories, pleading or subpoena required to be served under any of the provisions of Sections 1 through 14 of this act shall be served in the same manner as provided by law for the service of subpoenas on witnesses. Provided, whenever a party is represented by an attorney of record, such service may be made upon the attorney of the party. Service upon the attorney shall be made by delivering a copy to him or by mailing it to him at his last-known address. For purposes of this section, "delivering a copy" to an attorney means handing it to the attorney or leaving it at his office with his clerk or other person in charge thereof, or if there is no one in charge, leaving it in a conspicuous place therein, or if the office is closed or the attorney has no office, leaving it at his dwelling house or usual place of abode

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[558] *Cf.* Excello Feed Milling Co. v. Warren County, 159 Miss. 167, 131 So. 270 (1930).

[559] Miss. Code Ann. § 11-51-79 (1972).

[560] See notes 553 through 555 and accompanying text *supra*.

[561] See notes 556 through 557 and accompanying text *supra*.

[562] One must keep in mind that the supreme court has the inherent rulemaking power with respect to procedural matters. Newell v. State, 308 So. 2d 71, 76 (Miss. 1975). The Act at section 15 likewise "confers" the power on the supreme court to make rules governing the practice and procedure of the circuit, chancery, and county courts.

The court has held that appeals are regulated by statute and only lie in cases provided by the statutes. McMahon v. Milam Mfg. Co., 237 Miss. 676, 115 So. 2d 328 (1959). Appeal is not a matter of right. Patterson v. Autrey, 236 Miss. 316, 110 So. 2d 377 (1959).

[563] See sections 17 through 19 of the Act at part XV *A infra*.

> with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.
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> A copy of any notice or other papers served upon an attorney as provided by this section shall be filed promptly with the clerk of the court together with a certificate setting forth the date of service and manner of service, which shall be sufficient evidence of the service and shall constitute the return thereof. Whenever a party has the right or is required to take some action within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon his attorney of record by mail as herein provided, three (3) days shall be added to the prescribed period for the taking of such action.

This provision is largely self-explanatory and has no exact equivalent in the federal rules. Parts of this provision were taken from federal rules 5 and 6.

Section 13 makes it clear that papers in the cause which are required to be served under any of the provisions of the Act may be served upon the parties themselves even when the parties are represented by counsel.[564] Service upon the parties themselves will be made in the manner of service of subpoenas upon witnesses.[565] The statute providing for service of subpoenas upon witnesses[566] does not provide for the actual method of service. A general statute,[567] however, provides that subpoenas will be served personally in the manner of a summons.[568]

If the party is represented by an attorney of record, service of the papers in the cause which are required to be served under the Act *may be made* upon the attorney of the party. One should note that service upon a party's attorney under section 13 is not mandatory; but it is permissible and in most cases will be the better procedure.[569] In fact, federal rule 5(b), which is somewhat similar to this particular provision of section 13, requires service upon a party's attorney[570] rather than

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[564] The section expressly provides that when a party is represented by an attorney, service *may be made* upon the attorney. See notes 569 & 570 and accompanying text *infra*.

[565] *See* MISS. CODE ANN. § 13-3-93 (1972).

[566] *Id.*

[567] *Id.* § 13-3-101.

[568] *Id.* § 13-3-33. There are three methods of service of a summons and hence, three methods of service under section 13: (1) Upon the defendant (party) personally if found in the county by handing him a true copy of the summons (paper in the cause); (2) if the party cannot be found in the county, by leaving a true copy of the paper required to be served at the party's usual place of abode with his wife or some other willing family member above the age of 16 years; and (3) if the party cannot be found, and if service is not completed under number (2), by posting a true copy on the door of the party's usual place of abode. *Id.*

[569] Service upon the attorney rather than the party should expedite the entire litigation. 4 WRIGHT & MILLER § 1145, at 583.

[570] 2 MOORE ¶ 5.06, at 1351; 4 WRIGHT & MILLER § 1145, at 583.

merely permitting it as section 13 provides.

Service under section 13 may be made upon the party's attorney by personal delivery or by mailing the papers to the attorney's last known address.[571] Personal delivery of the papers is adequately defined in the section and needs little comment.[572] Section 13 expressly provides that service by mail is complete upon mailing, and "[a] paper is mailed when it has been placed in an envelope addressed to the last known address of the opposing attorney . . . and deposited in a United States Post Office or post office box."[573] Accordingly, a delay in the mails or some other similar hazard such as nonreceipt or nonacceptance should not affect the validity of service.[574] For convenience, and to forestall dispute, certified or registered mail should be used.[575]

Tactically, personal service upon an attorney and service by mail each has its respective advantages. For example, where a notice time limit is about to expire, and an opposing attorney lives some distance away, service by mail is the only feasible method of service to ensure compliance with the time limits. Another tactical consideration is the express provision in section 13 that whenever a party has the right or is required to take some action within a prescribed period after service, and such service is made upon his attorney by mail, 3 additional days will be added to the prescribed period.[576] Even if mailing is convenient,

> a party who desires to push his case and to avoid the delay of even a few days may find it advisable to make personal service upon an opposing party, if the opposing party is required to do some act or take some proceedings within a prescribed period after the service . . . .[577]

Section 13 provides that if service is made upon an attorney, either personally or by mail, a copy of the papers served must be filed promptly with the clerk of the court together with a certificate setting forth the date of service and the manner of service. This filing with the clerk will be sufficient evidence of the service and will constitute the return.[578]

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[571] 4 WRIGHT & MILLER § 1147, at 589-90.

[572] *See generally* 2 MOORE ¶ 5.07, at 1354; 4 WRIGHT & MILLER § 1147, at 589-90.

[573] 4 WRIGHT & MILLER § 1148, at 590-91.

[574] 2 MOORE ¶ 5.07, at 1355-56; 4 WRIGHT & MILLER § 1148, at 590; *see* Kiki Undies Corp. v. Promenade Hosiery Mills, Inc., 308 F. Supp. 489 (S.D.N.Y.), *aff'd in part, rev'd in part on other grounds*, 411 F.2d 1097 (2d Cir. 1969), *cert. dismissed*, 396 U.S. 1054 (1970).

[575] *See* 4 WRIGHT & MILLER § 1148, at 592.

[576] This provision for 3 additional days is equivalent to federal rule 6(e), except that section 13 only provides the additional time in cases of service by mail upon the attorney.

[577] 2 MOORE ¶ 5.07, at 1357.

[578] This provision is in accord with the general Mississippi provisions for service of notice by parties to an action. *See* MISS. CODE ANN. § 13-3-83 (1972).

XIV. Section 14. Deposition Expenses

> *Section 14.* No part of the expenses of the taking of depositions, other than the serving of subpoenas, shall be adjudged, assessed or taxed as court costs. If a party desires to take the deposition of any person outside of the state, he shall tender to all other parties the reasonable cost for transportation, food and lodging necessary for the attendance at the deposition of the attorneys for the other parties. If necessary, the trial judge shall decide what are reasonable and necessary expenses.

Section 14 is an exception to the general rule used in state courts[579] and federal courts[580] that the costs of a lawsuit should be awarded to the prevailing party unless the court directs otherwise.

Section 14 exempts all of the expenses of taking depositions from an award of costs to the prevailing party. However, subpoena expenses incurred in taking a deposition may be assessed as court costs.

The expenses of taking a deposition will be borne by each of the parties when the deposition is taken in the state. If the deposition of any person is scheduled to be taken out of the state, however, the party desiring to take the deposition is required to tender to all other parties the reasonable cost for transportation, food, and lodging necessary for the attendance at the deposition of the attorneys for the other parties. The trial judge has the discretion to decide what expenses are reasonable and necessary.

This provision will have a major impact on the taking of depositions. For example, a plaintiff retaining counsel on a contingency-fee basis will not be liable for any deposition costs of the defendant if the defendant prevails. Another area of impact will be the inability of a nonresident party to recover costs of depositions which he took in the state. Additionally, a nonresident party is responsible to opposing parties for expenses of an out-of-state deposition.

XV. Sections 15-23. Administrative Provisions

The remainder of the Act—sections 15 through 23—is administrative in nature, and depending upon the penchant of the Mississippi Supreme Court and the legislature, these provisions may provide the framework for far-reaching change in the civil practice and procedure in this state.

Section 15 provides the

> Supreme Court shall have the power to prescribe from time to time by

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[579] *Id.* § 11-53-27.

[580] Fed. R. Civ. P. 54(d).

general rules, the forms of process, writs, pleadings, motions, rules of evidence, and the practice and procedure of the circuit, chancery and county courts of this state in civil actions.

Section 16 protects the substantive rights of litigants with respect to rules prescribed pursuant to the Act and specifically preserves the right of trial by jury. The section further provides that rules of evidence prescribed under the terms of the Act "shall not alter any statutory provision respecting privileged communications or competency of witnesses."

A. Advisory Committee

Sections 17 through 21 provide the framework for establishing an Advisory Committee on the "Rules of Civil Practice and Procedure" in Mississippi. The committee will consist of one supreme court justice, three circuit judges, three chancellors, two county court judges, three practicing attorneys representing the trial bar, and two other practicing attorneys of at least five years' experience. The committee will select a chairman and vice-chairman from its members, and the Mississippi Supreme Court has the authority to employ and pay a research counsel for the committee either in a full-time or part-time capacity together with such other persons as the court deems necessary.

The primary function of the committee is to draft and submit to the court proposed "Rules of Civil Practice and Procedure." The process for adoption of the rules is rather complex but warrants a brief outline. At least 120 days before the beginning of a regular legislative session, the supreme court's proposed rule or rules will be filed with the Secretary of the Senate and the Clerk of the House who will forward copies of the rules to the respective judiciary committees, en banc. Either of the judiciary committees may adopt a resolution within 60 days disapproving the rules in their entirety.

There is a provision for "self-enactment": if a disapproving resolution is not adopted by either judiciary committee within the 60-day period, "then at least 30 days before the beginning of the next succeeding regular session of the Legislature" the Clerk of the Court will mail copies of the proposed rule or rules to the legislature and the bar, and the proposed rules will become effective on the first day of July "next succeeding" unless a concurrent judiciary committee resolution disapproves any portion of the rules. Any rule or rules disapproved will not become effective. However, there is a procedure for supreme court alteration of the disapproved rules within 30 days of legislative adjournment, together with another "self-enacting" provision. Any proposed rule reported to the legislature by the court must designate by section number any statute with which the proposed rule conflicts.

B. *Statutes Repealed*

Section 22 repeals most of the current discovery procedures. However, the procedures will continue in force in all actions pending in the supreme court or circuit, chancery, or county courts prior to the effective date of the repeal—January 1, 1976. The statutes repealed include: *Miss. Code Ann.* §§ 13-1-27 to -51, -55 to -75 (1972).

C. *Effective Date*

Section 23 provides that the effective date of sections 1 through 14 and 22 is January 1, 1976. However, sections 1 through 14 will not apply to cases begun in the supreme court or circuit, chancery, or county courts prior to January 1, 1976. The remainder of the Act took effect upon its passage.

CONCLUSION

In adopting the new discovery procedure, the Mississippi Legislature has laid the cornerstone for a modern legal system in this state. This piece of legislation also establishes a procedure for orderly consideration and implementation of further reforms in the state's legal system

One change which can be expected soon is the liberalization of pleading requirements. The basic premise of modern discovery is that discovery procedures — not pleadings — are used to develop the facts and issues in litigation. Modern practice requires only that pleadings give notice to the opposing party of the basic claims raised. That party may then employ discovery to secure complete disclosure of all relevant facts which support the claim. Since parties will now have access to modern discovery procedures, Mississippi courts can and should be more lenient in the interpretation of pleading requirements. In addition, one of the first tasks of the new Advisory Committee should be a complete review of Mississippi pleading procedures.

Another badly needed reform is the implementation of a summary judgment procedure. Summary judgment is used in the federal system to dispose of cases where it is decisively demonstrated by affidavits that no material issue of fact exists. A similar summary judgment procedure would represent a substantial improvement over the current Mississippi practice. The only related device in Mississippi is the demurrer. However, in considering the demurrer the court must base its ruling exclusively on the pleadings; parties are not given an opportunity to go beyond the pleadings and test the allegations of the opposing party. Under a summary judgment procedure the court could consider affidavits and material developed through discovery. The proper use of this procedure would permit the early resolution of cases in which a full trial is not warranted.

The only significant difference between the Mississippi discovery procedure and the federal discovery procedure is the omission in Mississippi of a procedure for requiring physical and mental examinations of parties. Under the federal rules, a party may be required to disclose medical reports in his possession or, with appropriate safeguards, to submit to a physical or mental examination by a physician selected by the opposing party. This procedure is absolutely essential to permit a party fairly and adequately to test allegations of physical injury or mental incapacity. Hopefully, an equivalent procedure will be included among the early proposals for additional procedural reforms in Mississippi.

In this legislation the Mississippi Legislature has expressed its intent and the intent of the people of Mississippi to establish a modern legal system in which all matters relevant to the determination of a case can be obtained and brought before the court by the parties. This reform, however, will be effective only if courts honor not only the letter but also the spirit of the new procedure. The purpose of the new discovery rules is to create a procedure which will enable parties to learn prior to trial all relevant matters related to the issues in litigation. To accomplish this purpose, there must be a strong presumption in favor of permitting discovery. If the Mississippi courts honor this presumption, this legislation will be the most important reform in the Mississippi judicial system in this century.

APPENDIX I

Circuit Court of _____ County
State of Mississippi

In the Matter
of
The Petition of _____
to Perpetuate the Testimony
of _____

Petition to Perpetuate Testimony

1. through 5. (substantive requirements of the petition; see notes 70 through 91 and accompanying text *supra*.)

Wherefore, the petitioner prays for an order authorizing the petitioner to take the depositions of _____ and _____, for the purpose of perpetuating their testimony.

/s/_____
(petitioner)

_____ _____
(attorney for petitioner) (address)

_____ _____
(address) (date)

Verification

State of Mississippi
County of _____

(Petitioner), being duly sworn, deposes and says that he resides at _____; that he is the petitioner herein; and that he has read the foregoing petition and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ _____
(Petitioner)

Acknowledgement
State of Mississippi
County of _____
Personally appeared before me, the undersigned authority at law in and for the state and county aforesaid, (petitioner), who acknowl-

edges that he signed the above and foregoing petition and verification on the date therein set out. /s/ _____
(Notary Public)

(Seal)

My Commission expires: _____

See 2 L. Frumer & I. Hall, Bender's Federal Practice Forms F2138, at 233 (1975); 4 Moore ¶ 27.05, at 1819.

APPENDIX II

In the Circuit [Chancery] Court of _____ County,
State of Mississippi

(title of action) Request for Admission of Facts ____

To: _____
(attorney for plaintiff [complainant])

_____
(address)

Defendant _____ requests plaintiff [complainant] _____ within 30 days after service of this request upon him in the above-styled action to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. (state a fact).
2. (state a fact).

_____
(attorney for defendant)

_____
(address)

See 2A L. FRUMER & I. HALL, *supra* F3054, at 464.

A request for the admission of the genuineness of a document follows a similar form, except that the party is asked to admit the genuineness of the documents, and where the first fact is stated, the form should read:

> 1. That the following document, exhibited with this request, is genuine: . . . Exhibit A.

See id. F3055, at 504.8. Some provision should be made indicating that the document is available for inspection and copying. *Id.*

A response to a request for admission is captioned similarly, and the body should read:

> _____, plaintiff [complainant] makes the following statement in response to the request for admission of facts [or of the genuineness of documents] served upon him by defendant on _____, 19__.
>
> Request No. 1. He cannot truthfully admit or deny . . . .

Id. F3061, at 512.

Other forms are available, and they should suffice in most cases in the state courts. For the forms, see *id.* F3054 to F3063.1.

A NATIONAL PERSPECTIVE ON JUSTICES OF THE PEACE AND THEIR FUTURE: TIME FOR AN EPITAPH?

*James A. Gazell**

> A first step for those States without formal plans for court reorganization and unification would be to abolish the justice of the peace and municipal courts in metropolitan areas and to replace them with unified county or multi-county systems . . . staffed by full-time judges with law degrees who are members of the bar . . . [and] centralized in administration in each metropolitan area, under the guidance of a chief judge who in turn is subject to the direction and supervision of the chief justice of the State supreme court.[1]

This comment from the National Advisory Commission on Criminal Justice Standards and Goals in 1973 represents the latest call for the elimination of justices of the peace and other judicial fee offices as one significant step toward bringing about local justice systems that are honest, competent, fair, reasonably uniform, and effective. Such advocacy dates implicitly from 1906[2] and explicitly from 1927.[3] A spate of recent judicial and legislative events in the states have cast doubt on the future of such courts and suggest the central theme of this article: Within a decade or two the time will probably be at hand to write an epitaph for these tribunals, although their personnel may still thrive in reorganized state judicial systems.

The justice of the peace is the most prominent—but not the only—type of court which exercises limited original criminal and civil jurisdiction and which depends on the collection of fees from guilty or liable defendants as the primary, if not sole, method of maintaining itself. This position originated in England, finds protection in state constitutions, and derives its responsibilities from constitutional and statutory sources which distinguish this office from other lower courts.[4]

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[1] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 162 (1973) [hereinafter cited as COURTS].

[2] *See* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUD. SOC'Y 55, 62-63 (1962).

[3] *See* Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118, 140-41 (1927).

[4] *See* THE INSTITUTE OF JUDICIAL ADMINISTRATION, THE JUSTICE OF THE PEACE TODAY

Although other types of fee offices (such as police magistrates and constables) have remained significant, the justice of the peace has easily received the greatest degree of attention in the literature of the legal profession. For instance, the last century has witnessed a steady stream of articles on this subject, particularly from Great Britain, where such courts originated, as well as from the United States.[5] Even though these articles have included occasional examinations of American developments, the latest one is more than 11 years old.[6] For this reason alone, an updated study and synthesis would be desirable.

I. Origins and Development

A. The English Heritage

An understanding of recent state judicial and legislative actions centering on the justices of the peace entails a brief digression into their origin and development. The institution originated in medieval England during the reign of Richard I who, in 1195, directed his knights to keep his peace and to apprehend violators. Typically, the knights' functions centered on policing rather than adjudication since they turned over prisoners to the county sheriff. By 1327 such knights, commonly known as conservators of the peace, operated in each county. A year later, the King invested them with their first judicial authority (the right to punish alleged offenders), which underwent considerable enlargement before 1361 when they officially became justices of the peace and held general (or quarterly) sessions as well as special (or petty) ones in each county. As Crown appointees without tenure of office, they functioned to achieve compliance with the common law on a local basis without gathering so much power as to become a threat to centralized authority—the monarch or Parliament. The county sheriffs originally paid them a salary from the collection of paid fines, the practice apparently resting on a foundation of convenience and simplicity. This system of remuneration, however, fell into disuse as the Crown wanted to reduce public expenditures. Such desuetude, as well as a law barring lords from accepting payment for their judicial services, tended to lead to the appointment of the propertied and opulent classes over commoners and to presage a tradition that the justice of the peace served without pay.[7]

(1965) [hereinafter cited as Institute]; Ballentine's Law Dictionary 696 (3d ed. 1969); Black's Law Dictionary 1003 (4th ed. 1968).

[5] *E.g.*, Hazard, *Justice Courts in Oregon: an Introduction*, 53 Ore. L. Rev. 407 (1974); Reichert, *Magistrates Courts: Lay Cornerstone of English Justice*, 57 J. Am. Jud. Soc'y 138 (1973); Comment, *Fee System Courts: Financial Interest of Judges and Due Process*, 31 Wash. & Lee L. Rev. 474 (1974).

[6] Vanlandingham, *The Decline of the Justice of the Peace*, 12 Kan. L. Rev. 389 (1964).

[7] *See* C. Beard, The Office of Justice of the Peace in England 17-19 (1962); W.

Over the centuries these officials grew in authority and esteem as Parliament accorded them highly diversified powers. They came to epitomize the fusion of police, judicial, and administrative powers at the county level. Although their responsibilities fluctuated over the centuries, these judicial officials generally embodied the following characteristics: a willingness to serve as regal instruments, an aristocratic heritage, competence, a lay background toward the law, and a tradition of deciding only criminal rather than civil matters.[8] English justices of the peace continued to reflect these attributes until the 1700's when partisan strife and frequent vacancies transformed such positions into patronage outlets based mostly on political loyalty. At this time the decline of this venerable institution began and lasted until 1888, by which time the justices of the peace had lost their police functions to local departments and their administrative functions to elected county councils. The renowned British legal scholar Frederick W. Maitland became so discouraged about the future of this office that he wrote its epitaph, albeit prematurely in retrospect.[9] Nevertheless, the bulk of the justices' of the peace judicial authority survived and even underwent a modest expansion. This office continues as a widely revered part of the British judicial system staffed with a broader cross section of the British people and with better-educated laymen.[10]

B. The American Experience

The justice of the peace came to the New World in 1607 when the English settled at Jamestown in what later became colonial Virginia. The system quickly spread through the subsequent colonies as the most readily available source of local justice. The justices of the peace in the settlements closely followed the homeland experience with much success. For instance, the seven Virginians who signed the Declaration of Independence had served as justices of the peace.[11] After the American Revolution, this office remained in high esteem. Writing in the 1830's, the illustrious French observer Tocqueville saw the justice of the peace as a generally laudable official:

HOLDSWORTH, A HISTORY OF ENGLISH LAW 291 (7th ed. 1966); F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 206-09 (1926); F. MILTON, THE ENGLISH MAGISTRACY 1, 3-7 (1967); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 200-01 (2d ed. 1903); Ewing, *Justice of the Peace—Bedrock of Democracy*, 21 TENN. L. REV. 484, 486 (1950); Maudsley & Davies, *The Justice of the Peace in England*, 18 U. MIAMI L. REV. 517, 518-19 (1964).

[8] *See* W. HOLDSWORTH, *supra* note 7, at 288; F. MILTON, *supra* note 7, at 3-7.

[9] INSTITUTE, *supra* note 4, at 109; F. MILTON, *supra* note 7, at 13-14.

[10] Karlen, *Judicial Administration* in 8 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 300 (D. Sill ed. 1968).

[11] Ewing, *supra* note 7, at 491-92.

> The Americans have borrowed from their fathers, the English, the idea of an institution that is unknown on the continent of Europe: I allude to that of justices of the peace.
>
> The justice of the peace is a sort of middle term between the magistrate and the man of the world, between the civil officer and the judge. A justice of the peace is a well-informed citizen, though he is not necessarily learned in the law. His office simply obliges him to execute the police regulations of society, a task in which good sense and integrity are of more avail than legal science. The justice introduces into the administration, when he takes part in it, a certain taste for established forms and publicity, which renders him a most unserviceable instrument of despotism; and, on the other hand, he is not a slave of those legal superstitions which render judges unfit members of a government. The Americans have adopted the English system of justices of the peace, depriving it of the aristocratic character that distinguishes it in the mother country.[12]

Respect for this institution, however, soon began to wane. As territories became states and as the frontier continued to recede, significant changes occurred. The justices of the peace were no longer appointed by a central authority, such as a colonial governor. Jacksonian democracy entailed that such positions be elective.[13] Since the pioneers were an impoverished rather than affluent populace, the fee system became more influential in deciding cases. Because the settlers were poorly educated, judicial competence was scarce and the quality of justice rested more on the personal attributes of the officer than on the law itself. The persons elected as justices of the peace, however, were usually the most trusted members in frontier communities. Matters, such as the performance of marriage where clergymen were absent, brought such judges into the area of civil jurisdiction as a supplement to their criminal authority. In sum, the frontier experience drastically changed the kind of people who occupied such offices and slowly generated the plethora of criticism which the American version of this institution later received.[14]

Whereas the 19th century witnessed the establishment of such courts in the newly created states, the 20th century has seen both the zenith and the steady decline of this office. In 1915, justices of the peace were mentioned in 47 (out of 48) state constitutions.[15] By this time, five kinds of fee systems had been created by statute: (1) a simple fee system, which compensated such judges partly or wholly through fees that

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[12] *See* 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 76 (1948).

[13] GLICK & VINES, STATE COURT SYSTEMS 38, 40 (1973).

[14] Smith, *Justice of the Peace* in 8 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 524-25 (E. Seligman ed. 1932).

[15] INSTITUTE, *supra* note 4, at 1.

came from the fines and costs resulting from criminal convictions; (2) an alternative fee system, which paid such officials through levies on convicted defendants or through governmental sources in the event of acquittals; (3) a limited alternative fee system, a variation of the second method, which placed a maximum limit on governmental payments; (4) a penalty fund (or competitive) fee system, which compensated justices of the peace through funds collected previously from levies against acquitted as well as guilty defendants and which created rivalries among these officials to handle as many actions as possible; and (5) a salary fund fee system, which provided for judicial salaries released from a fund of accumulated fines and cash.[16] The first indication of dissatisfaction with such institutions emerged in 1906 when a young legal scholar, Roscoe Pound, perceived court structures in the states as archaic because of their multiplicity, their concurrent jurisdiction, and their waste of judicial manpower.[17] Justices of the peace constituted the lowest rungs of such structures. In 1909 he, among others, advocated a statewide, uniform set of county (or lower) courts with minor criminal and civil jurisdiction, which would absorb the jurisdiction of justices of the peace and their counterparts.[18] At about the same time metropolitan areas, starting with Chicago, proceeded to abolish such institutions.[19]

In 1927 legal authority Chester H. Smith made the first public critique of this office—a prototype for subsequent castigation:

> While the justice of the peace system has a long history and has been firmly imbedded in the fundamental laws of the states, yet it is an anachronism in our jurisprudence the perpetuation of which cannot be justified. The justices of the peace as a class are wholly unqualified for the position they occupy. The pernicious fee system and local politics break down their integrity and lead to corruption. They are often ignorant and wholly uncontrolled by statute or constitution. Their decisions are purely personal. The administration of justice by these lay magistrates is uncertain, unequal and unstable and, in truth, the system as such, is a denial of justice according to our highest conception of that term.

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[16] *See* Reynolds, *The Fee System Courts—Denial of Due Process*, 17 OKLA. L. REV. 323, 376-77 (1964); Comment, *The Fee System Courts: Financial Interest of Judges and Due Process*, 31 WASH. & LEE L. REV. 474, 475-76 (1974).

[17] Pound, *supra* note 2, at 62-64.

[18] SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION, REPORT OF THE SPECIAL COMMITTEE TO SUGGEST REMEDIES AND FORMULATE PROPOSED LAWS TO PREVENT DELAY AND UNNECESSARY COST IN LITIGATION in 34 REPORTS OF AMERICAN BAR ASSOCIATION 589, 602 (1909) [hereinafter cited as 1909 ABA REPORT]. *See also* Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUD. SOC'Y 225, 225-29 (1940); Pound, *Organization of Courts*, 11 J. AM. JUD. SOC'Y 69, 78-81 (1927).

[19] 1909 ABA REPORT, *supra* note 18, at 591; INSTITUTE, *supra* note 4, at 2.

> The importance of the justice of the peace system cannot be over-over-estimated for it is in these minor courts that most of our citizens come in contact with our judicial organization. Here it is that our courts have their greatest political influence. Here it is that confidence or lack of it is established in our judiciary.
>
> . . . .
>
> If our states are to realize the ideal of the Magna Charta, that "To no one will we sell, to no one will we refuse or delay, right or justice," there must be statewide abolition of the office of justice of the peace. This can be accomplished most certainly and effectively by constitutional enactment.[20]

Beside the fee system and the justices' of the peace alleged lack of legal education, he might have added other widely alleged flaws: their archaic procedures, their failure to serve as courts of record which resulted in numerous trials *de novo* on appeal, inadequate supervision by the highest state court or by the general trial courts, part-time services, poor facilities, and unfairness and unevenness in local justice.[21]

Professor Smith's excoriation prompted a number of analyses to improve this institution or to eliminate it.[22] For instance, in 1931 the prestigious National Commission on Law Observance and Enforcement (more commonly known as the Wickersham Commission in deference to its chairman) took the former course, although it leaned toward abolition.[23] Despite individual efforts,[24] organized criticism (especially in the legal profession) did not reappear until the early 1960's. A national preoccupation with more important matters (such as the Depression, World War II, and the Cold War with its emphasis on internal security) accounts for much of this lapse. Since 1962, however, a torrent of influential groups has explicitly or implicitly sought the abolition of justices of the peace and their kindred offices: the American Bar Association (1962),[25] the American Judicature Society (1962),[26] the National Munici-

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[20] Smith, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118, 140-41 (1927).

[21] INSTITUTE, *supra* note 4, at 2.

[22] *See, e.g.*, Butts, *Justice of the Peace—Recent Tendencies*, 1 MISS. L.J. 195 (1928); Keebler, *Our Justice of the Peace Courts—A Problem in Justice*, 9 TENN. L. REV. 1 (1930).

[23] NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 120, 181 (1931).

[24] *See* Pollack, *Cow Pasture Justice*, 28 MICH. STATE B.J. 12, 12-16 (1949); Vanlandingham, *Pecuniary Interest of Justices of the Peace in Kentucky; The Aftermath of Tumey v. Ohio*, 45 KY. L.J. 607, 607-25 (1957).

[25] ABA MODEL STATE JUDICIAL ARTICLE (1962), *reprinted in* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE TASK FORCE REPORT: THE COURTS 92 (1967).

[26] MODEL STATE JUDICIAL ARTICLE, *reprinted in* Holt, *The Model State Judicial Article in Perspective*, 47 J. AM. JUD. SOC'Y 6, 8, 10 (1963).

pal League (1963),[27] the Institute for Judicial Administration (1965),[28] the President's Commission on Law Enforcement and Administration of Justice (1967),[29] the New York-based Committee on Economic Development (1967),[30] the National Advisory Commission on Civil Disorders (1968),[31] the National Conference on the Judiciary (1971),[32] the Advisory Commission on Intergovernmental Relations (1971),[33] and the National Advisory Commission on Criminal Justice Standards and Goals (1973).[34]

II. Judicial Developments

Salient judicial developments centering on the justice of the peace and other fee positions date from 1927 when the United States Supreme Court entered the picture. In *Tumey v. Ohio*,[35] a simple fee system case, the Court held that a defendant, who received a criminal trial before a judge with "a direct, personal, [and] substantial interest in convicting him,"[36] had suffered a deprivation of liberty or property without due process of law, violating the fourteenth amendment of the United States Constitution. Tumey had been arrested and brought before the mayor's court in a southwestern Ohio village, North College Hill, on a charge of unlawfully possessing intoxicating liquor. After rejecting Tumey's move to dismiss the case because of a due process disqualification, the mayor tried and convicted the defendant, fined him $100, and imprisoned him until payment. In this case the judge was also the village's chief executive officer whose fees (as well as local revenues) depended substantially on finding defendants guilty and levying fines and costs against them. In fact, during a nearly 8-month period in 1923, the mayor-judge had received $696.35 from such cases besides his regular salary.[37] Moreover,

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[27] National Municipal League, Modern State Constitution 81-82 (1968).

[28] Institute, *supra* note 4, at 2, 13.

[29] The President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 321 (1968); The President's Comm'n on Law Enforcement and Administration of Justice, *supra* note 25, at 34-36.

[30] Committee for Economic Development, Modernizing State Government 63-64 (1961); Committee for Economic Development, Reducing Crime and Assuring Justice 21-22 (1972).

[31] The National Advisory Comm'n on Civil Disorders, Report of the National Advisory Commission on Civil Disorders 183 (1968).

[32] National Conference on the Judiciary, *Censensus Statement of the National Conference on the Judiciary* in Justice in the States 265, 266-67 (W. Swindler ed. 1971).

[33] Advisory Comm'n on Intergovernmental Relations, For a More Perfect Union—Court Reform 1-2, 9 (1971); Advisory Comm'n on Intergovernmental Relations, State-Local Relations in the Criminal Justice System 14, 34, 36-37 (1971).

[34] Courts, *supra* note 1, at 162.

[35] 273 U.S. 510 (1927).

[36] *Id.* at 510.

[37] *Id.* at 511, 515, 521.

during the same time span the village received about 35.8 percent of the total fines.[38] Speaking for a unanimous court, Chief Justice Taft even viewed the $12 cost assessments per case as high enough to warrant judicial disqualification.[39] After long, conflicting appeals, the conviction was reversed.[40]

A year later, however, in *Dugan v. Ohio*,[41] which centered on a salary fund fee system, the Court limited the impact of the *Tumey* decision by unanimously holding that, where a mayor was merely one of five members that ran a city, where the city manager was the main executive, where the mayor's functions were solely judicial, where the mayor's sole compensation was a salary paid from a general fund into which the fines were placed, and where his salary did not depend on convictions or acquittals, the mayor's connection with the city funds was not close enough to warrant a presumption of bias toward conviction and a denial of due process.[42] This case, like *Tumey*, was based on a liquor-possession conviction from Ohio, except that the matter arose in a different municipality.[43]

These landmark cases exerted little impact on justices of the peace and other fee officers because state supreme courts often distinguished related cases from *Tumey* and *Dugan* which negated their effect and resulted in the maintenance of politically powerful fee systems. A variety of reasons were alleged: a presence of procedural safeguards in the state unavailable in *Tumey*; the right to a jury trial; the opportunity for a trial *de novo* on appeal to a higher court; the right of a defendant to raise an objection before a fee officer as a basis for appeal; the right to a change of venue before a salaried judge; the minimal fees; and the payment of fees upon acquittal as well as conviction.[44]

Nonetheless, the highest courts in several states implemented the federal decisions to outlaw certain kinds of fee systems. For example, in 1935, the West Virginia Supreme Court of Appeals struck down a salary fund fee system, similar to the one in *Dugan*,[45] although this tribunal later stipulated that objections to disqualify such judges are waived if not raised in the first instance.[46] Moreover, in 1961 the same

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[38] *Id.* at 521. This percentage resulted from the following calculations: $4,471.25 + $2,697.25 = $7,168.50 ÷ *circa* $20,000 = *circa* 35.8 percent.

[39] *Id.* at 523.

[40] *Id.* at 511.

[41] 277 U.S. 61 (1928).

[42] *Id.* at 63, 65.

[43] *Id.* at 62.

[44] Comment, *supra* note 16, at 477; Comment, *Constitutional Challenge of the Justice of the Peace Court in Mississippi*, 44 MISS. L.J. 996, 1001-02 (1973).

[45] Williams v. Brannen, 116 W. Va. 1, 178 S.E. 67 (1935).

[46] State v. Simmons, 117 W. Va. 326, 185 S.E. 147 (1936).

court invalidated a statute which allowed such a system.[47] In 1956 the Kentucky Court of Appeals voided a simple fee system which resembled the one in *Tumey*.[48] In 1969 the Supreme Court of Arkansas emulated Kentucky's action.[49] In 1961 and 1963, however, the supreme courts in Washington[50] and Michigan,[51] respectively, upheld simple fee systems because of appellate and procedural safeguards, such as a change of venue and the right to a jury trial. The Supreme Court of South Dakota in 1971 preserved an alternative fee system through statutory construction.[52]

In 1972 the nation's highest court took advantage of an opportunity to extend the *Tumey* decision. In *Ward v. Village of Monroeville*[53]—a third Ohio case—it held that, where a defendant was tried for alleged traffic offenses before a mayor who bore responsibility for village finances, and where the fines, costs, forfeitures, and fees levied by the mayor's court provided a considerable part of village funds, such a defendant was deprived of a trial before an impartial judge in violation of due process.[54] This decision broadened the *Tumey* holding in two respects. First, no longer were all the elements in the concept of "direct, personal [and] substantial" pecuniary interest necessary to warrant judicial disqualification. Substantiality alone was enough. Whereas in *Tumey*, the mayor recevied $696.35 personally in fees from defendants whom he had found guilty, the mayor in *Ward* obtained no such income.[55] However, as in *Tumey* where 35.8 percent of the village income came from such levies, the figures in *Ward* were slightly higher.[56] Moreover, when the Ohio legislature narrowed the jurisdiction of the mayor's courts, this northern Ohio village hired managerial consultants to ascertain the possible impact of the restriction on local finances.[57] Justice Brennan, speaking for the majority, couched the reversal of the conviction (as well as lower appellate court actions) in these words:

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[47] State *ex rel.* Osborn v. Chinn, 146 W. Va. 610, 121 S.E.2d 610 (1961).

[48] Roberts v. Noel, 296 S.W.2d 745 (Ky. 1956).

[49] Doty v. Goodwin, 296 Ark. 147, 437 S.W.2d 233 (1969) (denial of due process for presiding judge to have pecuniary interest in the conviction of the accused).

[50] *In re* Borchert, 57 Wash. 2d 719, 359 P.2d 789 (1961) (schedule of fees to compensate unsalaried justices of the peace is not unconstitutional).

[51] People v. Cheever, 370 Mich. 165, 121 N.W.2d 430 (1960) (defendant was not deprived of a fair trial before a justice of the peace).

[52] Wood v. Good Shield, 88 S.D. 625, 188 N.W.2d 757 (1971) (police magistrate had no pecuniary interest in conviction).

[53] 409 U.S. 57 (1972).

[54] *Id.* at 61-62.

[55] *Id.* at 59-60.

[56] *Id.* at 58.

[57] *Id.* at 58-59.

> The fact that the mayor there [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle. Although "the mere union of executive power and the judicial power in him cannot be said to violate due process of law," the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . ." Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."[58]

Second, just as the mayor's financial stake in the outcome of cases had shifted from direct to indirect or from personal to communally substantial, a widening occurred from a mainly empirical test for determining such an interest to a philosophical concern sensitive as much to the appearance of justice as to its substance.[59] Justice Brennan's comment suggests this broadening. A brief dissent filed by Justice White (with Justice Rehnquist concurring) preferred to face the issue of disqualifying interest and possible denial of due process "on a case-by-case basis"[60] rather than on a broader basis because they were not ready to

> assume either that every mayor-judge in every case will disregard his oath and administer justice contrary to constitutional commands or that this will happen often enough to warrant the prophylactic, *per se* rule urged by petitioner.[61]

Moreover, the dissent pointed out that the "Ohio mayor who judged this case had no direct financial stake in its outcome."[62]

The *Ward* decision is significant not only for its extension of *Tumey*, but also for other reasons. First, it rejected a pair of contentions used by state supreme courts to circumvent the application of the original case: the presence of statutes providing "for the disqualification of interested, biased or prejudiced judges"[63] and the opportunity for rectification on appeal by a trial *de novo*.[64] The court dismissed the first

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[58] *Id.* at 60 (citations omitted), *quoting from* Tumey v. Ohio, 273 U.S. 510, 532, 534 (1927).

[59] *Id.* at 60-61.

[60] *Id.* at 62 (White, J. dissenting).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

argument as insufficient because it evidently applied only to special instances of judicial prejudice, not to the more general challenge made by *Ward*. One implication of this rejection is that in the Court's view the application of such statutes, even if successful and convenient, would merely leave defendants facing adjudication before another mayor whose financial interest in the outcome of the case might be the same as, or greater than, the first mayor's. Furthermore, this reply is still another sign that the *Ward* decision represented a broadening of *Tumey*. The Court discounted the *de novo* review argument in order to grant defendants judicial impartiality in the first instance.[65] Second, the *Ward* holding edged toward *Dugan* without putting the latter in danger because of the gulf between "only very limited executive authority" in that case and "wide executive powers" in *Ward*—a gap not easily bridged unless the Court pays far more attention to the appearance of justice in future cases.[66] Third, the *Ward* decision revealed another method of circumventing *Tumey*: a reliance on analogies to *Dugan* in order to defeat the appellant's claim.[67] The Ohio Court of Appeals for Huron County in 1969 and the Ohio Supreme Court in 1971[68] had followed this course. Fourth, the 1972 decision exemplified judicial activism, for the Court was willing to put itself in conflict with other policy makers, judicial as well as legislative.[69] Finally, like *Tumey*, the *Ward* holding faced the difficulty of winning acceptance and enforcement at the state appellate court level where it might encounter circumvention.[70]

At least three signs, however, point toward a better fate for *Ward*. First, *Ward* has been mentioned in several cases which center on disqualifying interests affecting not only courts but also other governmental agencies, such as employee-review boards[71] and town councils.[72] Second, the West Virginia Supreme Court of Appeals has been foremost in applying *Ward* just as it had been in enforcing *Tumey*. It recently overturned, on the basis of due process violations, a limited alternative fee system (involving a justice of the peace who received additional fees from decisions favoring plaintiffs in civil cases)[73] and a pair of competi-

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[65] *Id.* at 61-62.

[66] *Id.* at 60-61.

[67] *Id.*

[68] Monroeville v. Ward, 27 Ohio App. 2d 17, 254 N.E.2d 375 (1969), *aff'd*, 27 Ohio St. 2d 179, 271 N.E.2d 757 (1971). *See also* State *ex rel.* Brookman v. Proctor, 35 Ohio St. 2d 79, 298 N.E.2d 532 (1973).

[69] G. SCHUBERT, JUDICIAL POLICY-MAKING 154-57 (1965).

[70] *See id.*

[71] *See, e.g.*, Hardison v. Carmany, 88 Nev. 670, 679, 504 P.2d 1, 7 (1972).

[72] *See, e.g.*, People v. Kessler, 77 Misc. 2d 640, 643, 354 N.Y.S.2d 517, 520 (Suffolk County Ct. 1974).

[73] State *ex rel.* Reece v. Gies, 198 S.E.2d 211 (W. Va. 1973).

tive fee systems (centering on a municipal judge who received $5 per conviction[74] and a justice of the peace who charged $5 per civil case, regardless of whether it was completed or discontinued).[75] Such actions may forecast the outcomes of challenges to other fee systems—justices of the peace receiving $8 fees for each criminal conviction and those charging the same amount for issuing the arrest warrants.[76] Finally, to support the contention that defendants are entitled to due process of law through impartial judges *ab initio* and to justify the overturning of a conviction by a nonlawyer trial judge, the California Supreme Court cited the *Ward* case in its landmark decision, *Gordon v. Justice Court*.[77]

III. Legislative Developments

Judicial developments affecting the authority and operations of justices of the peace and other fee offices signify, at most, limited change by accretion. Such results stem from the nature of the judicial process itself—the dependence of appellate courts on suitable cases; the often costly, time-consuming, individualized and arduous process of appeal; the limits of rulings to the case at hand; the matter of needing other governmental bodies to enforce court decisions; and the constitutional right of legislatures to regulate the jurisdiction of courts, appellate as well as trial. Nevertheless, judicial interventions at the appellate level, although restricted and often inefficacious, may serve as a catalyst for significant legislative actions, especially if judicial decisions in a particular area of the law are fairly uniform, frequent, and thus cumulative. Court actions over a long time, reinforced by organized and individual criticism, often engender a political atmosphere that facilitates notable legislative developments. However, since the state courts have tended to sidestep the *Tumey* holding and since justices of the peace and kindred judges often constitute powerful vested interests, legislative actions to eliminate or revamp such offices have had to surmount formidable barriers. Nevertheless, an increasing number of states are succeeding.[78] All together, 31 states (62 percent) have made *progress* toward the

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[74] Keith v. Gerber, 197 S.E.2d 310 (W. Va. 1973).

[75] State *ex rel.* Shrewsbury v. Poteet, 202 S.E.2d 628 (W. Va. 1974).

[76] Comment, *supra* note 16, at 484-87. Two cases challenging these systems were never faced on the merits. Sherman v. Robinson, No. 13388 (W. Va. Sup. Ct. App. filed July 3, 1973) (dismissed as moot); Hartford v. Warner, No. 13393 (W. Va. Sup. Ct. App. filed July 17, 1973) (general denial taken as true after failure of plaintiff to file supportive evidence as directed). See letter from George W. Singleton, Clerk, West Virginia Supreme Court of Appeals, to the *Mississippi Law Journal*, July 3, 1975.

[77] 12 Cal. 3d 323, 329-32, 525 P.2d 72, 76-78, 115 Cal. Rptr. 632, 636-38 (1974), *cert. denied*, 420 U.S. 938 (1975). The same question faced in *Gordon* has been posed in North v. Russell, 516 S.W.2d 103 (Ky. 1973), *vacated and remanded*, 95 S. Ct. 673, *prob. juris. noted*, 95 S. Ct. 2652 (1975) (No. 74-1409).

[78] See Appendix I.

elimination of the justice of the peace by removing constitutional references to the office, by eradicating the fee system, by failing to replace the position (as in Illinois), or by supplanting it with a uniform set of lower tribunals.[79] Other states, like California and Pennsylvania,[80] have improved it by eliminating the fee system, by requiring minimal legal competence, and by tightening supervision from the state supreme court and general trial court levels. Such developments have proceeded more from recurrent complaints (and possible emulation of federal action in 1946) than from rigorous, empirical analysis of justice of the peace courts.[81] In fact, a state (for instance, Georgia) may have difficulty ascertaining exactly how many justices of the peace it has, especially since many are inactive.[82] Consequently, one cannot estimate the full scope and impact of such institutions in the national picture of American justice, although the national total for such officials and their courts certainly exceeds 6,000.[83]

The first state to make legislative moves against such offices was Virginia which, in 1936, replaced most of them with salaried trial justices. In 1956 they became county or municipal court judges appointed by the circuit court (the general trial court) and were required to be licensed attorneys.[84] Although in 1945 Missouri became the first jurisdiction to eliminate the office by superseding magistrate courts,[85] followed

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[79] AMERICAN JUDICATURE SOC'Y, COURTS OF LIMITED JURISDICTION: A NATIONAL SURVEY 89 (1975) (The most comprehensive up-to-date study of the lower-court systems in the United States). *See also* INSTITUTE, *supra* note 4, at 6.

[80] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 89, 442-45; *see* BOOZ, ALLEN & HAMILTON INC., *Chronological Summary of State Court Reorganization within [the] Past 25 Years* in CALIFORNIA LOWER COURT STUDY App. F. at 13-14 (1971) [hereinafter cited as BOOZ, ALLEN & HAMILTON INC.]; Kephart & Spirack, *A History of the District Justice System in Pennsylvania*, 44 PA. B. ASS'N Q. 512 (1973). *See also* Guthrie, *Administration of the District Justices of the Peace from a County Point of View*, 44 PA. B. ASS'N Q. 516 (1973).

[81] P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 230-31 (1973).

[82] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 142; Interview with Hon. Chris Perrin, Assistant Director—Court Coordination and Research, Administrative Office of Courts (Georgia), in Atlanta, Georgia, Feb. 16, 1975.

Perrin estimated the number of justices of the peace to be 1,728. Letter from Hon. Chris Perrin, Assistant Director—Court Coordination and Research, Administrative Office of Courts (Georgia) to James A. Gazell, Feb. 21, 1975.

[83] See Appendix II. There are more than 12,000 lower-court judges in the United States—perhaps as many as 16,000 officials. The precise number of lower-court judges who are justices of the peace is unknown. *See* AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 3; LEAA, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973, at 89 (1973).

[84] BOOZ, ALLEN & HAMILTON INC., *supra* note 80, at 15-16; INSTITUTE, *supra* note 4, 4-5.

[85] INSTITUTE, *supra* note 4, at 6.

two years later by New Jersey,[86] legislative action did not begin in earnest until the 1950's when six states took significant steps toward abolition. In 1956 Louisiana eliminated justices of the peace within wards of cities whose population exceeded 5,000.[87] In 1957 New Hampshire terminated the jurisdiction of justices of the peace except for ministerial functions.[88] That year Ohio replaced such courts with a system of county and municipal tribunals.[89] In 1959 North Dakota took the same action.[90] The same year Tennessee followed by creating a set of general sessions courts in all but six counties.[91] Finally, in 1959 Wisconsin eliminated the fee system but retained the jurisdiction of justices of the peace until 1966.[92] It should be added that in 1950 California upgraded its justice courts by prohibiting the fee system and by requiring the passage of a competency test.[93] Furthermore, in 1956 Minnesota excised all references to this office in its constitution to make possible the termination of such positions through legislation alone.[94]

The 1960's brought even greater legislative thrusts, which centered on a dozen states. In 1961 Maine replaced the office with a set of district courts.[95] The same year Washington ended the fee system, replaced this office with justice courts in the three largest counties, and permitted other counties to take this action by local option—a process that has eliminated justices of the peace from all but seven counties.[96] Illinois abolished the office and transferred its jurisdiction to a uniform system of circuit (or general trial) courts.[97] In 1962 Colorado substituted a county court system for its fee offices.[98] North Carolina ended the fee system but waited until 1970 to replace justices of the peace with district courts.[99] New York permitted areas outside New York City to replace this office by local option, although none is reported to have done so. The nation's largest city lacked such an office.[100] In 1963 Michigan es-

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[86] *Id.*

[87] *Id.* at 7.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 8.

[91] *See* BOOZ, ALLEN & HAMILTON INC., *supra* note 80, at 3.

[92] *Id.*

[93] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 89; INSTITUTE, *supra* note 4, at 6.

[94] *See* Booz, Allen & Hamilton Inc., *supra* note 80, at 3.

[95] *Id.* at 5.

[96] Letter from Roberta Kast, research associate, American Judicature Society to James A. Gazell, Jan. 30, 1975.

[97] *See* BOOZ, ALLEN & HAMILTON INC., *supra* note 80, at 6.

[98] *Id.*

[99] *Id.*

[100] INSTITUTE, *supra* note 4, at 11; American Judicature Soc'y, *Court Reorganization Reform—1962*, 46 J. AM. JUD. SOC'Y 110, 113 (1962); The Wall Street Journal, Dec. 15, 1969, at 14. *See also* N.Y. CONST. art. 6, § 17a-c (1938).

tablished statewide district courts to supplant justices of the peace and other fee offices,[101] while Minnesota replaced its justices of the peace with a unified municipal court in Hennepin County, which embraces Minneapolis.[102] In 1965 Delaware abolished the fee system and converted justices of the peace into salaried officials supervised by the chief justice of the state supreme court.[103] In 1966 New Mexico ended the fee system as a step toward the abolition of the office itself 6 years later.[104] In 1968 Oklahoma substituted district courts for its lower tribunals, including justices of the peace.[105] In 1969 Arkansas eliminated the accrual of fees to justices of the peace in criminal cases.[106] Then Kansas reduced the jurisdiction of the office to $1 and abolished constitutional references to it in 1972.[107]

The brisk pace of legislative ferment against justices of the peace and other fee offices has continued into the 1970's. So far, at least 10 states have taken significant actions. In 1971 Idaho replaced its justices of the peace with magistrate divisions in its district court systems.[108] That year Maryland made a similar change.[109] In 1972 Nebraska established a uniform system of county courts to absorb the jurisdiction of justices of the peace and their counterparts.[110] In 1973 Florida eliminated these offices and replaced them with a statewide system of county courts.[111] That year Iowa abolished its numerous lower courts, along with justices of the peace, and is considering a uniform system of minor tribunals.[112] Virginia, which in 1936 became the first state to eliminate some justices of the peace, began in 1974 to phase out the remaining officials as their terms expired.[113] On April 9, 1974, Vermont terminated the judicial functions of its justices of the peace.[114] On November 5, 1974,

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[101] INSTITUTE, *supra* note 4, at 11.

[102] *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 193 (1975); Letter from Roberta Kast, research assistant, American Judicature Society to James A. Gazell, Jan. 30, 1975.

[103] BOOZ, ALLEN & HAMILTON INC., *supra* note 80, at 11.

[104] Letter from Roberta Kast, research associate, American Judicature Society to James A. Gazell, Jan. 30, 1975.

[105] BOOZ, ALLEN & HAMILTON INC., *supra* note 80, at 13.

[106] Letter from Roberta Kast, research associate, American Judicature Society to James A. Gazell, Jan. 30, 1975.

[107] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 190.

[108] *Id.* at 158.

[109] *Id.* at 242.

[110] *Id.* at 324.

[111] *Id.* at 129.

[112] *Id.* at 184.

[113] *Id.* at 518; letter from Roberta Kast, research associate, American Judicature Society to James A. Gazell, Jan. 30, 1975.

[114] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 511; letters from Hon. Lawrence J. Turgeon, Court Administrator (Vt.) to James A. Gazell, Dec. 28, 1973 and Aug. 15, 1974.

the voters of West Virginia approved a judicial reorganization amendment that provided for the termination of the fee system and this office by January 1, 1977 and the absorption of its jurisdiction by a statewide system of magistrate courts. Ratified by a 62-percent to 38-percent margin and carrying 39 of the state's 55 counties, the 275 justices of the peace face replacement by 133 magistrates, some of whom may turn out to be former justices of the peace since they are eligible for life to seek election to these superseding positions.[115] On January 1, 1975, the elimination of the justices of the peace in Alabama became effective as their functions devolved to three kinds of lower courts: district, probate, and municipal.[116] This change was made possible by the voters' overwhelming ratification of a new judicial article on December 18, 1973.[117] Furthermore, on January 1, 1975, Wyoming eliminated the fee system of compensation for justices of the peace and placed them under the supervision of the state supreme court.[118] Finally, on January 7, 1975, South Dakota followed Kansas and Iowa by erasing constitutional reference to its various types of lower courts, including justices of the peace, and supplanted them with a uniform system of limited tribunals.[119]

Other states find themselves at different points along the road toward the abolition of justices of the peace and their counterparts. At the beginning stands Georgia which has endeavored to ascertain the number of active and inactive justices in its 159 counties. So far, 1,728 officials have been located.[120] This elementary but arduous step is a *sine qua non* for further study and for possible recommendations to upgrade or eliminate such positions.

A short distance away lies Mississippi, which in 1970 completed a legislative study that urged the abolition of the fee system throughout the state, as well as a reduction in the number of justices of the peace from over 500 to approximately 200. These recommendations derived mainly from a litany of allegations: the dependence of such officials on law-enforcement agencies for criminal cases; a similar reliance on creditors (particularly large businesses) for civil litigation; the practice of making the dismissal of criminal charges rest on the defendant's payment of costs in civil suits; the tendency of constables to exert pressure

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[115] Letter from Hon. Forrest J. Bowman, Administrative Director of Courts (W. Va.) to James A. Gazell, Mar. 17, 1975.

[116] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 51.

[117] The Montgomery Advertiser, Dec. 20, 1973, at 1, col. 4.

[118] Letter from Mrs. Jean Coonrod, Secretary to Chief Justice Glenn Parker (Sup. Ct. Wyo.) to James A. Gazell, Nov. 19, 1973; letter from Roberta Kast, research associate, American Judicature Society to James A. Gazell, Jan. 30, 1975.

[119] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 478.

[120] Interview with Hon. Chris Perrin, Assistant Director-Court Coordination and Research, Administrative Office of Courts (Georgia), in Atlanta, Georgia, Feb. 16, 1975.

on justices of the peace to allow the participation of deputy sheriffs, who constitute another party to fee-splitting arrangements; the proclivity of creditors to seek those justices of the peace who charge defendants rather than plaintiffs for filing costs; ambiguous jurisdictional boundaries; and competition among judges for cases. So far, successful legislative action on these recommendations has not been taken.[121]

Farther along is Louisiana whose voters, on April 20, 1974, ratified by a 57.8-percent to 42.2-percent margin a new constitution containing a judicial article which removed the constitutional status from six kinds of lower courts, including justices of the peace, and allowed the legislature to merge or abolish such institutions. The new document became operative on January 1, 1975, as the Louisiana Law Institute and the Legislative Council continue to explore the optimal means of implementation.[122]

Beyond Louisiana stands Indiana which, in 1970, removed justices of the peace as constitutional offices and which has sought to replace them with a statewide system of county courts. Such proposed legislation, if adopted, would take effect by the end of 1978. During the last 2 years, attempts to eliminate the 425 offices in the state have failed. A more modest approach centers on Marion County which embraces Indianapolis, the state capital. This proposal would supplant justices of the peace in the county with small claims courts run by salaried judges, all of whom would eventually have to be lawyers. A few months ago both bills cleared the state legislature and were signed into law.[123]

Kentucky has traveled a longer distance. In mid-1974 its legislature passed a constitutional amendment to supplant numerous limited and special tribunals, including an estimated 646 justices of the peace, with a statewide set of district courts, one for each county. This proposal faces submission to the electorate in November, 1975. If approved, it would take full effect by 1978. The influential Kentucky Citizens for Judicial Improvement has been seeking to amass the popular support necessary for ratification.[124]

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[121] MISSISSIPPI JUDICIARY COMM'N, REPORT TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI 58-60 (Jan. 6, 1970).

[122] AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 217; letter from Hon. William V. Courtney, Depty Judicial Administrator (Sup. Ct. La.) to James A. Gazell, Aug. 16, 1974; Baton Rouge Morning Advocate, Apr. 22, 1974, at 4-A.

[123] American Judicature Soc'y., *Indiana Abolishes JP Courts, Raises Judge's Salaries*, 59 J. AM. JUD. SOC'Y 49 (1975). *See also* From the State Capitals, Mar. 10, 1975, at 1 (a newsletter); *id.*, Mar. 31, 1975, at 1; *id.*, Mar. 12, 1975, at 2-3.

[124] D. ACKERS, THE KENTUCKY JUDICIAL DEPARTMENT 11 (1973); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 36 (1971); AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 202; From the State Capitals, Apr. 8, 1974, at 1; *id.*, July 29, 1974, at 3-4; *id.*, Oct. 28, 1974, at 3.

Other states have made an even longer trek toward abolition of justices of the peace, but have encountered defeat at or near the end. In 1972 the voters in two states—Montana and Nevada—rejected constitutional amendments providing for such change.[125] During the first 7 months of 1974, the Texas Constitutional Convention seriously considered, *inter alia*, the future of justices of the peace and other minor courts. A proposed judicial article partially unifying the state judicial structure received the overwhelming approval of the Convention (117 in favor, 45 opposed). Although entrusting a proposed state supreme court with broad, supervisory powers over the entire judicial system (including the right to assign judges and cases laterally or vertically and to make procedural and administrative rules), the article still permitted some lower tribunals to remain outside the partly consolidated system, including justices of the peace. However, despite the efforts of such proponents as Convention Chairman Price Daniel, Jr. (also the Speaker of the Texas House of Representatives) and Convention Judiciary Committee Chairman, Representative L. Dewitt Hale, the assemblage failed by a mere three votes to secure the two-thirds margin of approval necessary for the submission of a proposed state constitution containing this article to the electorate. This defeat stemmed not from the political pressures exerted by justices of the peace but primarily from the controversy generated by other issues, such as the inclusion of a "right-to-work" provision vehemently opposed by organized labor and an alleged lack of leadership by Governor Dolph Briscoe. No subsequent proposals to reorganize the state court system and to change the office of justice of the peace have been introduced into the state legislature.[126]

Conclusion

This study has endeavored to furnish a national perspective of the principal developments that have combined to guide the evolution of judicial fee offices in the states, most prominently, the justices of the peace, and to shape their future. This examination underscores the

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[125] American Judicature Soc'y, *supra* note 79, at 328, 343; American Judicature Society, *An Educated Citizenry Reaps Election Day Results*, 56 J. Am. Jud. Soc'y 180, 181 (1972); Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 J. Am. Jud. Soc'y 316, 323 (1973).

[126] Letter from Hon. Jim Hutcheson, Chief Council, Texas Civil Judicial Council to James A. Gazell, Aug. 13, 1974; *see* Committee on the Judiciary, The Judiciary Official Committee Report—[Tex. Const.] Article V §§ 1, 9(d), 10(c), 11(a,b) (1974); Committee on the Judiciary, The Judiciary Committee Official Second Reading Adoption—[Tex. Const.] Article V §§ 1, 8(d), 9(c), 10(a,b) (Tex. Const. Convention 1974). *See also* American Judicature Soc'y, *supra* note 79, at 495-96; Texas Civil Judicial Council, Interim Report: County Courts, Justice of the Peace, and Municipal Courts, January - June 1974 at 17 (1974).

central theme that the time may soon be at hand to write an appropriate epitaph for this office, especially since 31 states have *progressed* toward the abolition of this position and its counterparts. This motif suggests two remaining areas for brief consideration: a prediction of demise and the significance of this probable fate.

It is likely that all the states will have replaced this institution before the end of the 20th century. The exact date depends on the stability of several calculative assumptions. One is that trends in the states will continue for the next decade or two. This projection is tenable because of the extensive legislative actions taken since 1956.[127] A second assumption centers on whether one uses the date when states first took action (such as the elimination of the fee system or constitutional references to justices of the peace) or the time that they completed their efforts (such as the abolition of the offices themselves). Since this consideration encompasses only a few states—Wisconsin, North Carolina, and New Mexico—the choice of starting point matters little.[128] A third tenet is that abolition by some states tends to produce justifications and impetus for similar moves in the remaining jurisdictions by making change appear safer and less drastic. If states continue to act as they have since 1971, all states will have eliminated (or have moved toward the abolition of) justices of the peace by 1981 at the earliest. If such developments proceed as they have since 1936, however, such progress will not have enveloped every state until 1999. The choice of an intermediate date (1956) leads to an extrapolation of 1988 as the probable date for such advancement.[129]

The significance of such a demise is twofold. On the one hand, the justices of the peace and other fee officers are likely to flourish within unified state court systems, for their lobbying power with state legislatures has usually been sufficient to ensure their immediate inclusion as magistrates or the like in general trial courts (for instance, Illinois),[130] their continuous eligibility to seek such jobs (as in West Virginia)[131] or even their survival with reduced authority and strong supervision from the state supreme court and general trial courts (as in Pennsylvania).[132] On the other hand, gains in salary, prestige, and job security from engraftment onto a new judicial structure may offset losses in fees and in autonomy, the requirements of abiding central direction, and the possible requirement of legal training or in-service education. The absence

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[127] See Appendix I.

[128] *Id.*

[129] *Id.*

[130] ILL. ANN. STAT. ch. 37, § 160.3 (Smith-Hurd 1972). THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *supra* note 25, at 35.

[131] W. VA. CODE ANN. § 50-20-4 (1975 Supp.).

[132] See note 79 *supra*.

of fees should overcome embedded habits in most former justices of the peace. It should permit the emergence of a more dispassionate outlook toward litigants and should help to bring greater honesty, competence, fairness, reasonable uniformity, and effectiveness to the administration of local justice.

In short, an appropriate epitaph might read: "Here Lies the Justice of the Peace, Who Died in the Furtherance of Justice."

APPENDIX I

STATE PROGRESS TOWARD THE ELIMINATION OF THE JUSTICE OF THE PEACE

Time Span	Abolitions (Full and Partial)	
	Counting Earlier Dates	Not Counting Earlier Dates
1936-1940	1 (3.2%) (Va., 1936)*	0 (0.0%)
1941-1945	1 (3.2%) (Mo., 1945)	1 (3.2%) (Mo., 1945)
1946-1950	1 (3.2%) (N.J., 1947)	1 (3.2%) (N.J., 1947)
1951-1955	0 (0.0%)	0 (0.0%)
1956-1960	6 (19.4%) (La., 1956; N.H., 1957; Ohio, 1957; N.D., 1959; Tenn., 1959; *Wis.*, 1959)	5 (16.1%) (La., 1956; N.H., 1957; Ohio, 1957; N.D., 1959; Tenn., 1959)
1961-1965	8 (25.8%) (Me., 1961; Wash., 1961;* Colo., 1962; Ill., 1962; *N.C.*, 1962; Mich., 1963; Minn., 1963;* Del., 1965)	7 (22.6%) (Me., 1961; Wash., 1961;* Colo., 1962; Ill., 1962; Mich., 1963; Minn., 1963;* Del., 1965)
1966-1970	4 (12.9%) (*N.M.*, 1966; Okla., 1968; Ark., 1969;* Kan., 1969***)	5 (16.1%) (*Wis.*, 1966; Okla., 1968; Ark., 1969; Kan., 1969;*** *N.C.*, 1970)
1971-1975	10 (32.3%) (Id., 1971; Md., 1971; Neb., 1972; Fla., 1973; Ia., 1973; Vt., 1974; W. Va., 1974; Ala., 1974; S.D., 1975; Wyo., 1975)	12 (38.7%) (Id., 1971; Md., 1971; Neb., 1971; *N.M.*, 1972; Fla., 1973; Ia., 1973; *Va.*, 1974;* Vt., 1974; W. Va., 1974; Ala., 1975; S.D., 1975; Wyo., 1975)
Total	31 (100.0%)	31 (99.9%)**

Legend: *italics* Variant state
* Partial abolition
** Rounding error
*** Jurisdiction reduced to $1.00

Source: Letter from Roberta Kast, *supra* note 96, at 1-3.

APPENDIX II

ESTIMATED NUMBER OF JUSTICES OF THE PEACE IN THE STATES

States	Total Justices	Total Courts
1. Arizona	89	89
2. Arkansas	88	88
3. California	214	214
4. *Delaware	53	14
5. Georgia	1,728	1,728
6. Indiana	406	406
7. Kentucky	646	est. 600
8. *Louisiana	431	423
9. *Minnesota	est. 392	80
10. Mississippi	est. 323	323
11. Montana	unknown	to be determined
12. Nevada	unknown	54
13. New York	unknown	unknown
14. Oregon	54	54
15. Pennsylvania	584	584
16. *Tennessee	3	3
17. Texas	est. 934	est. 934
18. Utah	171	171
19. *Vermont	several hundred	several hundred
20. *Washington	26	26
21. *Wyoming	to be determined	34
Total	at least 6,142	at least 5,825

Legend: * Have made progress toward the elimination of this office.

Sources: AMERICAN JUDICATURE SOC'Y, *supra* note 79, at 65, 77, 88, 124 178, 208, 224, 298, 311, 332, 347, 440, 443, 492, 500, 509, 516, 529, 544.

THE FEDERAL COMMITMENT TO CRIME CONTROL AND ITS INFLUENCE ON THE MISSISSIPPI JUDICIAL SYSTEM

*Arlen B. Coyle**
*Shannon Deen Turner***

> The problems of crime bring us together . . . . Even as we join in common action, we know there can be no instant victory . . . . Ancient evils do not yield to easy conquest . . . . We cannot limit our efforts to enemies we can see. We must, with equal resolve, seek out new knowledge, new techniques, and new understanding.[1]
>
> *Message from President Lyndon B. Johnson to the Congress, March 9, 1966*

On March 9, 1966, President Lyndon B. Johnson formally announced a declaration of "War on Crime" in the United States.[2] The principal weapon in the "battles" to come was to be a barrage of money mainly funded through the block grant program of the Law Enforcement Assistance Administration (LEAA). This article will review the overall growth and development of LEAA, including the states' response to the influx of federal money, and the LEAA's impact on the criminal justice system in Mississippi. The authors will also focus on the effectiveness of Mississippi's use of LEAA funds to assist the judiciary and propose some recommendations for the expansion of such programs.

I. History of LEAA

A. Inception

Nine months prior to President Johnson's "War on Crime" address he had established the President's Commission on Law Enforcement and Administration of Justice[3] (the Crime Commission), and by early 1966 he was receiving preliminary draft reports of the Commission's

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[1] H. R. Exec. Doc. No. 407, 89th Cong., 2d Sess. 5146 (1966).
[2] *Id.*
[3] Exec. Order No. 11,236, 3 C.F.R. 329 (1965).

findings. One of the Crime Commission's major conclusions was that the roles of the police, the courts, and correction institutions were functions of a single system—the criminal justice system—and should be addressed as such.[4] As the Crime Commission worked to formulate some 200 specific recommendations intended to lead to a safer and more just society, President Johnson exhorted Congress and the governors of the 50 states to establish state and federal machinery to use federal revenues in assessing local problems of law enforcement, criminal justice, and corrections; to gather and analyze statistical data pertaining to local needs; and to prepare and implement coordinated measures for improving effectiveness in local crime control and prevention.

In February 1967 the Crime Commission submitted to President Johnson its complete report, concluding that "the police, the courts, and correctional agencies will require substantially more money if they are to control crime better."[5] The money to which the Crime Commission alluded in its report was to be primarily federal revenues[6] dispensed by the state governments according to state-developed plans.

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[4] *Cf.* Rogovin, *The Genesis of the Law Enforcement Assistance Administration: A Personal Account,* 5 COLUM. HUMAN RIGHTS L. REV. 9, 11 (1973).

[5] A REPORT BY THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, at x (1967) [hereinafter cited as CRIME COMMISSION REPORT].

[6] While the Commission is convinced State and local governments must continue to carry the major burden of criminal administration, it recommends a vastly enlarged program of Federal assistance to strengthen law enforcement, crime prevention, and the administration of justice.

The program of Federal support recommended by the Commission would be directed to eight major needs:

The program of Federal support recommended by the Commission would be directed to eight major needs:

(1) State and local planning.

(2) Education and training of criminal justice personnel.

(3) Surveys and advisory services concerning the organization and operation of police departments, courts, prosecuting offices, and corrections agencies.

(4) Development of a coordinated national information system for operational and research purposes.

(5) Funding of limited numbers of demonstration programs in agencies of justice.

(6) Scientific and technological research and development.

(7) Development of national and regional research centers.

(8) Grants-in-aid for operational innovations. The Commission is not in a position to recommend the exact amount of money that will be needed to carry out its proposed program. It believes, however, that a Federal program totaling hundreds of millions of dollars a year during the next decade could be effectively utilized.

Id. at xi.

The Crime Commission's message that crime control would be staggeringly expensive was not lost on Congress. Chairman Celler, of the House Committee on the Judiciary, reported:

In 1967 the Johnson administration submitted to Congress its proposed statutory plan for establishing a system of state and federal cooperation in combating crime.[7] The administration's proposal adopted the objectives set out by the Crime Commission's report,[8] but varied radically in its approach to distributing the federal revenue. Rather than general block grants to states, H.R. 5037 contemplated a program of direct categorical federal grants to local units of government.[9] The immediate effect of this proposal was that the mayors of America's cities, hard pressed for funds for any services, detected a goldmine just over the horizon; the governors of the states, for the most part, ignored President Johnson's prodding that they establish planning agencies for using

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> [T]he Federal Government has an obligation to provide more support for local programs that deal with law enforcement and the administration of justice. The present level of Federal support provides only a minuscule portion of the resources that States and cities need to bring about meaningful changes. Crime is national in scope, as well as a State and local problem. . . .
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> . . . .
>
> The Federal contribution . . . is expected to increase substantially in magnitude. Fifty million dollars is authorized for fiscal year 1968; the Attorney General . . . stated that $300 million will be needed by fiscal year 1969; and that before 1972 . . . it could . . . exceed $1 billion.

HOUSE COMMITTEE ON THE JUDICIARY, REPORT ON THE LAW ENFORCEMENT AND CRIMINAL JUSTICE ASSISTANCE ACT OF 1967, H.R. REP. No. 488, 90th Cong., 1st Sess. 9, 10 (1967).

[7] H.R. 5037, 90th Cong., 1st Sess. (1967).

[8] The Commission identified seven objectives that would, theoretically, reduce crime:

> First, society must seek to prevent crime before it happens by assuring all Americans a stake in the benefits and responsibilities of American life, by strengthening law enforcement, and by reducing criminal opportunities.
>
> Second, society's aim of reducing crime would be better served if the system of criminal justice developed a far broader range of techniques with which to deal with individual offenders.
>
> Third, the system of criminal justice must eliminate existing injustices if it is to achieve its ideals and win the respect and cooperation of all citizens.
>
> Fourth, the system of criminal justice must attract more people and better people—police, prosecutors, judges, defense attorneys, probation and parole officers, and corrections officials with more knowledge, expertise, initiative, and integrity.
>
> Fifth, there must be much more operation and basic research into the problems of crime and criminal administration, by those both within and without the system of criminal justice.
>
> Sixth, the police, courts, and correctional agencies must be given substantially greater amounts of money if they are to improve their ability to control crime.
>
> Seventh, individual citizens, civic and business organizations, religious institutions, and all levels of government must take responsibility for planning and implementing the changes that must be made in the criminal justice system if crime is to be reduced.

CRIME COMMISSION REPORT, at vi.

[9] *See* Rogovin, *supra* note 4, at 10-11.

the forthcoming revenues.[10] Additional factors leading to the mixed reception of H.R. 5037 were the original bill's proposal to dispense federal revenues only to local governmental units with populations in excess of 50,000,[11] and the broad power it vested in the Attorney General to distribute grant funds virtually at his discretion.[12]

These objections to the administration's proposal were partially

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[10] Charles Rogovin, Administrator of the Law Enforcement Assistance Administration from 1969 to 1970, depicted the problem as follows:

> Naturally, mayors and local and county government officials preferred to deal directly with the Federal government for any new monies to be made available for "warring on crime" and improving systems of criminal justice. There were several reasons for this. Many localities had recruited and utilized "money finders" in the bonanza era of the 1960's when new or expanded categorical grant program offerings for localities emerged from the Congress in the New Frontier and Great Society Administrations. Anticrime performance was seen by local officals as an increasingly important factor for attracting voters, and new Federal money with local autonomy could be important in shaping positive political images. Most local officials were also concerned about the prospects of a state government awakened or stimulated to take an increased role in crime control and criminal justice activity through the availability of new Federal money. With real justification, local officials in many states would point to the abysmal record of state government performance in the field of court operation and corrections. In their minds, the prospect of innovative state activity in these components as well as in the police field was hardly bright. A further problem—a non-specific floating anxiety on the part of cities' leaders—was an antipathy toward the agents of state government who were traditionally viewed as unsympathetic to the needs of city government.

Id. at 11-12.

[11] *See* Peskoe, *The 1968 Safe Streets Act: Congressional Response to the Growing Crime Problem*, 5 COLUM. HUMAN RIGHTS L. REV. 69, 87 n.75 (1973).

[12] The potential for the attorney general to abuse his powers over the proposed federal funding program was highlighted during House debates by Representative Poff:

> Title II, which deals with action grants, has no proper safeguards. The Attorney General is vested with sole and exclusive power to handle $50 million in the next fiscal year and thereafter up to $1 billion a year as he sees fit and when he sees fit. The only limitation which is placed upon his discretion is that no more than 15 percent of the total authorization may be allocated to one State, and that limitation, I submit, simply means that the Attorney General may, if he chose to do so, grant the entire authorization to seven States, and the other 43 States and the District of Columbia would be denied any money whatever.

113 CONG. REC. 21090 (1967).

That the attorney general would abuse his powers was enunciated in a personal opinion by Representative Hebert:

> [F]rankly I have no confidence in the Department of Justice . . . .
>
> . . . .
>
> [I]t should be of interest to the House to know that the Department of Justice right now refuses to enforce the laws on the books which would curb and prevent riots and send to jail those people who are guilty.

113 CONG. REC. 21086 (1967).

met by amendments to H.R. 5037 which deleted the grant-in-aid provisions and substituted a block grant funding formula under which each state would receive a uniform base grant annually. Each state's annual block grant could be supplemented with additional revenues based on population and with discretionary grants from the Attorney General for worthy, individual law enforcement projects not otherwise funded.[13]

In 1968 H.R. 5037, as amended, was approved by both houses of Congress and enacted by President Johnson as the Omnibus Crime Control and Safe Streets Act of 1968.[14] The Act created the Law Enforcement Assistance Administration (LEAA) and mandated that it

> encourage States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement; authorize grants to States and units of local government in order to improve and strengthen law enforcement; and encourage research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals.[15]

B. Initial Operation and Direction

In fiscal 1969, the first year of operations, LEAA was appropriated $63 million, allocated as follows: $19 million for planning grants,[16] $29

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[13] *See* Peskoe, *supra* note 11, at 92-94.

[14] Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197.

[15] *Id.* 198.

[16] LEAA block grant allocations are categorized into activities:

> Action Funds—to encourage states and units of general local government to carry out programs and projects to improve and strengthen law enforcement; the heart of the funding scheme.
>
> Planning Funds—to encourage states and units of general local government to prepare and adopt comprehensive law enforcement plans based on their evaluation of State and local problems of law enforcement.
>
> Part E Funds—to encourage states and units of local government to develop and implement programs and projects for the construction, acquisition, and renovation of correctional institutes and facilities and for the improvement of correctional programs and practices.
>
> Part C Discretionary Funds—to encourage states and units of local government to execute programs and projects to improve and strengthen law enforcement.
>
> Part E Discretionary Funds—[same purpose as Part E Funds, given to worthwhile projects at discretion of LEAA].
>
> Law Enforcement Education Programs (LEEP)—to carry out programs of academic educational assistance to improve and strengthen law enforcement.
>
> Other—to provide funds for programs and projects falling into categories other than Part C and Part E.

A Report of the Mississippi Division of Law Enforcement Asssistance, Crime Control Funding by Jurisdiction in Mississippi 1969-74, 2-3.

million for research and development, $6.5 million for academic assistance, $2.5 million for administration, and $3 million for FBI programs. For planning grants, each state was awarded a base allocation of $100,000 plus an amount varying according to population. Awards ranged from $118,225 for Alaska to $1,387,000 for California. Action grants, based on population, ranged from $33,278 for Alaska to $2,351,610 for California.[17]

The first LEAA awards were special grants for riot prevention and crowd control and every state that applied—a total of 40—received a grant.[18] Overnight the attitudes of state governments toward federally funded law enforcement assistance shifted from indifference to a race for the gold.

In its first year of operations LEAA was both praised and cursed. Officials of large cities claimed they had been slighted in that the funds they received were relatively small compared to their crime rates.[19] Others felt that too much went to police to the exclusion of the courts, corrections, and research. These charges, however, were denied by Attorney General John Mitchell, who cited studies showing the nation's larger cities faring well under the program.[20]

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[17] LEAA, 1ST ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FISCAL YEAR 1969, at 3, 33-45 (1969).

[18] *Id.* at 4.

> The first action plan submitted was from California on April 10 [1968], containing 5,896 pages in 26 volumes. The planning had a broad base—with some 1,500 persons participating. Other plans soon arrived and were studied closely by the LEAA staff to make certain they were as comprehensive as possible and otherwise met statutory requirements. Some states broadened and expanded portions of their plans after consultation with LEAA. The first action grant was to California on May 22. Awards to other states followed quickly, and every plan was approved by June 30.

Id. at 3. Mississippi's share totaled $288,405, allocated as indicated in Appendix II.

[19] The Mayor of Detroit, for example, stated:

> In too many instances funds are being dissipated shotgun style across the states in many small grants that are not likely to have any significant impact on the crime problem and do result in a dollar allocation pattern that favors rural and suburban low crime areas. This distribution deprives high crime areas, such as core cities, of the urgently needed assistance.
>
> In many instances, state plans have overlooked individual needs of high crime areas, again particularly major cities, in favor of a generalized approach to problem solving. These approaches have emphasized improvements in basic law enforcement equipment and training techniques for areas with low crime problems that have not, up to now, felt the need to use their own funds to upgrade the competence and sophistication of their crime fighting apparatus.

Hearings on Federal Assistance to Law Enforcement Before the Subcomm. on Criminal Law and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess., 351 (1970).

[20] The Nation's 411 cities of 50,000 contain less than 40 percent of the total

C. *Congressional Response*

To Congress it was clear after 2 years of LEAA operation that more funds would be required to combat crime successfully:

> What seems to be the case is that this $24.65 million was not enough to meet the needs of everybody, no matter how it was stretched, and it can be expected that with the larger budgets of fiscal 1970 and succeeding years, enough money will be available to make a substantial impact in high-crime urban areas.[21]

In December 1970 Congress sent to the President the Omnibus Crime Act of 1970.[22] The Act effectuated 12 major changes in the 1968 legislation[23] and marked the first notable shift toward emphasizing the

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population and have 62 percent of the serious reported crimes. It is our initial estimate that these cities have been granted 60 percent of all FY 1969 action funds distributed to local governments by the state governments. The block grant funds for FY 1970 were only recently awarded to the states and are currently being redistributed to local governments.

In addition, the fiscal 1970 budget contained $32 million in discretionary funds, of which a major share was distributed by LEAA directly to cities. At least $10 million went to 125 cities with major crime problems. These awards ranged from a maximum of $250,000 for cities of more than one million to a maximum of $150,000 for those under one million.

Id. at 491.

[21] S. REP. No. 91-1253, 91st Cong., 2d Sess. 25 (1970).

[22] Act of Jan. 2, 1971, Pub. L. No. 91-644, 84 Stat. 1887, 1888.

[23] (1) Authorized appropriations for the next three fiscal years.

(2) Revised the administrative management of the Law Enforcement Assistance Administration.

(3) Relaxed, in defined areas on a showing of need, the matching requirements for discretionary and block grants.

(4) Relaxed certain of the restrictions on the use of grant funds for salaries.

(5) Authorized waivers of the mandatory requirement that specified percentages of state planning funds be made available to local units.

(6) Revised the provisions under which a part of each state's block action grant must be made available to local units.

(7) Provided that each state must allocate an adequate share of the benefits of title I block grant funds to areas characterized by high law enforcement activity.

(8) Established new program for the construction, acquisition, and renovation of correctional facilities and programs.

(9) Expanded the law enforcement education programs.

(10) Made numerous changes in the administrative provisions of the Act to increase the operational efficiency and staff capability of the administration.

(11) Established a federally subsidized plan of low cost life insurance for defined state and local law enforcement officers, patterned on the Servicemen's Group Life Insurance program, and to be underwritten by private life insurance companies.

(12) Provided for an overall Attorney General's Annual Report on Federal Law Enforcement and Criminal Justice Assistance Activities, which would bring together information from crime control and related programs throughout the government.

Id.

roles of courts and correctional institutions in the criminal justice process and de-emphasizing expenditures to deter riots and civil disorders. In fiscal 1969 funding for control of riots and civil disorders had been 19.7 percent of all LEAA action grants;[24] by the end of fiscal 1971 this had been reduced to 2 percent.[25]

Other trends were becoming discernible by the end of 1971. LEAA appropriations were leapfrogging yearly: $1.5 billion had been appropriated since 1969 and annual appropriations increased an average of $123 million, or 1,100 percent. LEAA became the fastest growing item in the federal budget, but the states' effective use of the federal funds did not parallel that growth. Congress found that "no more than 25 cents out of every 'action' dollar awarded by LEAA to the states in the first three years of this program have actually been disbursed to local governments."[26] On the other hand, crime rates were not decreasing. In virtual mockery of the millions of dollars being poured into criminal justice, the crime rate continued to rise in every jurisdiction in the United States.[27]

In mid-1970 a series of events coalesced to cause Congress to question the soundness of the entire LEAA concept: a large number of resignations and turnovers of key LEAA personnel, including the departure of Administrator Charles Rogovin; management weakness at both the federal and state levels; lack of effective management controls; inability of states to use fully their grant funds in effective manners; and the growing odor of irregularities in scandalous proportions concerning expenditures in Florida and Alabama. Prompted by these events, the House Committee on Government Operations formed a subcommittee to report on the block grant programs of LEAA.

D. House Subcommittee Report[28]

During the next year the subcommittee held extensive hearings and conducted a detailed investigation to determine what the taxpayers' $3,950,111,000 had purchased since the inception of LEAA. The findings were not gratifying.

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[24] LEAA, SECOND ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FISCAL YEAR 1970, at 45 (1970).

[25] LEAA, THIRD ANNUAL REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FISCAL YEAR 1971, at 43 (1971).

[26] HOUSE COMM. ON GOVERNMENT OPERATIONS, BLOCK GRANT PROGRAMS OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, H.R. REP. NO. 92-1072, 92d Cong., 2d Sess. 12 (1972).

[27] 1968 +17 percent, 1969 +12 percent, 1970 +11 percent, 1971 +6 percent, 1972 -4 percent, 1973 + 4.9 percent. FBI, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1968-1973).

[28] The material in the following sections is a summary of the subcommittee's findings as reported in BLOCK GRANT PROGRAMS OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, *supra* note 26.

The subcommittee found eight major areas of deficiency in the block grant funding scheme.

1. Program Analysis

No more than 25 cents out of every "action" dollar awarded to the states by LEAA during the first 3 years of operation were actually disbursed to local government units: $522,034,602 had been allocated to the states for action funds; $138,475,771 had been disbursed by the state planning agencies to the local government units. Even more abysmal were the performances of the nine largest states, which collectively garnered more than 50 percent of the action funds: $280,818,055 allocated; $52,821,758 or 18.8 percent disbursed. The states literally had more money than they knew what to do with.[29]

2. Hardware—Overpriced and Misused

The subcommittee found that where state funds had been used, too often too much went for the wrong things. Tens of millions of dollars were spent on airplanes, helicopters, automobiles, firearms, ammunition, computer systems, electronic surveillance systems, radio communications systems, and other similar items. Often there was no showing of competitive bidding on the purchases. The subcommittee observed:

> After 3 years of heavy commitment of block grant funds toward the purchase of hardware there is no reckoning of what improvement these expenditures have accomplished or even a list of what has been bought. Until LEAA can provide these, the presumption based on available evidence stands: block grant funds have subsidized a giant hardware procurement program. Those who have profited most are not necessarily the intended beneficiaries of the Safe Streets Act.[30]

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[29] The subcommittee observed that

> the American taxpayer is getting far less than he bargained and paid for. One can legitimately ask what utility the annual State plans and the grants which support them serve. One can ask to what purposes these suddenly-discovered funds are applied in the rush to make the money pump appear to be operating well. One can ask how many times such conduct has been duplicated in the 165 instances when [state planning agencies] have met the end of a fiscal year with "sizable chunks" of block grants on hand. One can ask how much greater is the risk of abuse and misuse of funds when they are distributed in such manner. The series of questions can go on. Incredibly, LEAA cannot answer them. So poor is its grasp and control of the block grant programs that its failure to respond in the face of such conduct is understandable, though not excusable.

Id. at 16.

[30] *Id.* at 47.

3. Consultant Abuses

It was apparent the criminal justice system needed competent, objective, and publicly accountable leadership, and LEAA's block grant programs proved to be lucrative sources of income for consultants—staggeringly lucrative in some instances. Ernst & Ernst, an accounting firm, received $1.1 million; the International Association of Chiefs of Police, $2.5 million; Touche Ross & Co., $3.1 million; Systems Development Corporation, $2.2 million; Peat, Marwick & Mitchell, $677,000; Management-Computer Interlock, Inc., $699,000 (in Arkansas alone); Booz, Allen & Hamilton, Inc., $550,450.

More disturbing than the size of some of the fees received by the consultants was the rapidity with which "consulting firms" suddenly were organized and became involved in "assisting" in the preparation of states' comprehensive plans.[31]

4. Duplication of Other Federal Programs

Of 361 projects funded by LEAA action funds, totalling $27 million, the subcommittee discerned that 104, funded at $7.6 million, fell within areas receiving, or eligible to receive, funds from other federal agencies, including HEW, the Department of Labor, and the Office of Economic Opportunity.

The projects qualifying for assistance from other federal sources included special education classes in California for kindergarten students with chronic learning problems, a New York youth employment service, a New York methadone treatment program, alcoholism treatment programs, and programs designed to prevent students from dropping out of high school.[32]

5. Failure to Evaluate

The subcommittee was especially critical of LEAA's total failure to evaluate and measure the efficacy of the myriad projects it had fi-

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[31] The subcommittee gave one particularly illustrative example of consultant abuses: Minutes before the close of business on June 15, 1970, a firm named Criminal Justice Systems, Inc. (CJS, Inc.) filed papers of incorporation with the appropriate State official in Alabama. The next day the firm received a check in the amount of $91,570 from the Alabama SPA for the purpose of preparing the State's 1971 law enforcement plan. The noncompetitive contract between the consulting firm and the Alabama SPA, paid out of the State's planning grant, had been executed on the day of the firm's incorporation. The criminal justice qualifications of the firm's principals, misrepresented by them at the start, were as flimsy as the company's experience.

Id. at 49.

[32] *Id.* at 61-62.

nanced. This failure stemmed from LEAA not having implemented standards, goals, or objectives for evaluation.[33]

6. Block Grant Funds in Banks and Bonds

The subcommittee determined that LEAA's failure to ensure compliance by the states with federal financial regulations cost the United States Treasury at least an additional $4.4 million in interest during the first 3 years of the Administration's existence. Surplus block grant funds created a bonanza for the investment portfolios of state governments.[34] The subcommittee was not overly shocked by the states' investment expertise but was incensed that "the Federal Government borrows back at prevailing interest rates the block grants it previously disbursed through LEAA which funds had previously been borrowed from the public."

7. Lack of Accountability

The subcommittee faulted both LEAA and the individual states for not auditing carefully the expenditures of grant funds. More than 80 percent of the expenditures during the first 3 years of LEAA had gone unmonitored as late as 1972. When detailed audits were conducted, the results were bleak indeed.

Through December 31, 1970, $475,000 was improperly expended in Florida. In Alabama $593,000 had been expended illegally and was required to be refunded to the United States Treasury. The irregularities

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[33] During the period of the subcommittee's investigation, LEAA created its National Commission on Criminal Justice Standards and Goals, charged with undertaking "a complete survey of the Nation's criminal justice system" for the purpose of establishing "national goals, performance standards, and priorities to help every criminal justice planner in the Nation chart where he is, where he wants to go, and how to be there." *Id.* at 74.

The subcommittee was unimpressed:

> In view of the fact that LEAA has allocated . . . only seven professional staff employees to undertake the extensive evaluation . . . that must be done, it is highly unlikely that any significant progress will be made . . . . [T]he drain of LEAA funds [to finance the Commission] further inhibits and retards the development of LEAA's own capabilities in this regard.

Id. Concluding its report in the area of "Failure to Evaluate," the subcommittee reflected:

> The fundamental question is whether the American taxpayer can afford heavy financial commitment to a program whose past performance is uneven, whose goals are inadequately identified, defined, and articulated, which is unprepared to provide an objective assessment of its successes and failures, and which provides benefits to States irrespective of performance or need.

Id. at 77.

[34] See Appendix I.

in these two states were described as only the "tip of the iceberg."[35]

In June 1971 the Administrator of LEAA requested that the states use existing audit resources to monitor grant projects. The responses from the governors were, with few exceptions, disheartening; states which had received millions from LEAA refused to assist in the most basic of management duties.

8. Politics and Bureaucracy

The subcommittee was appalled by the political skullduggery it unearthed in Wisconsin, Indiana, Arkansas, Florida, and Alabama. In some states the state planning agency (SPA) served at the governor's pleasure rather than under state merit systems and were repeatedly under pressure to perform political missions for the governor.

The Attorney General of Alabama stated to the subcommittee that in his state, "it became apparent that what had appeared to be a law enforcement officer's dream for badly needed help was becoming merely a politician's dream for the biggest pork barrel of them all."[36]

In considering the efficiency of the SPA's, the subcommittee concluded:

> On the whole, SPA regional offices have not been productive. In many cases they represent merely another bureaucratic tier between the crime problem and the source of funds.
>
> . . . .
>
> [T]he unavoidable consequence of management weaknesses in the SPA is that action grants, . . . the heart of the overall program, have been underutilized, misused, and wasted.[37]

E. New Directions

On August 6, 1973, President Nixon signed into law the Crime Control Act of 1973,[38] which further amended the Omnibus Crime Control and Safe Streets Act of 1968. The 1973 legislation was intended to make LEAA more efficient by streamlining its organization and authorizing increased management powers in the Administration. State planning grants were increased from a basic $100,000 to $200,000 annually and metropolitan areas with populations exceeding 250,000 were accorded special status for the purpose of receiving direct action grants.

LEAA's response to the charges of waste, corruption, and lack of leadership and direction, was to initiate a new national pro-

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[35] HOUSE COMM. ON GOVERNMENT OPERATIONS, *supra* note 26, at 47.

[36] *Id.* at 89.

[37] *Id.* at 102-03.

[38] Pub. L. No. 93-83, 87 Stat. 197.

ject—Criminal Justice Standards and Goals—which was essentially to be a management-by-objectives approach to combating crime. The Standards and Goals were a compilation of some 500 specific recommendations to the states covering virtually every facet of criminal justice. Proposed as a general goal was a 50 percent reduction in crimes by 1983. Specific goals included reduction of homicides by 25 percent, forcible rape by 25 percent, aggravated assault by 25 percent, robbery by 50 percent, and burglary by 50 percent.[39]

In reducing the five target crimes, the Standards and Goals Commission proposed four areas for priority action: Juvenile delinquency, delivery of social services, prompt determination of guilt or innocence, and citizen action. Finally, to achieve these goals, the Commission formulated specific proposals in seven major areas:[40] Criminal justice

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[39] THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME, xvi (1973).

[40] The proposals are summarized below:

1. Criminal Justice System. It was recommended that broad reforms and improvements in criminal justice planning and information systems should be effectuated and should include
   a. development of long range, comprehensive, coordinated, criminal justice planning;
   b. establishment of criminal justice coordinating councils by all major cities and counties;
   c. establishment by each state of a Security and Privacy Council to develop procedures and recommendations for legislation to assure security and privacy of information contained in criminal justice information systems;
   d. creation by each state of an organizational structure for coordinating the development of criminal justice information systems.
2. Community Crime Prevention. The Commission proposed involving all citizens in the war on crime by
   a. increasing citizens' contributions to crime prevention by making homes and businesses more secure, by participating in police-community programs, and by working with youth;
   b. expanding public and private employment opportunities and eliminating unnecessary restrictions on job opportunities for ex-offenders;
   c. establishing and supporting youth services bureaus to improve the delivery of social services to youngsters;
   d. providing a statewide capacity for overseeing and investigating the financing of political campaigns;
   e. establishing statewide investigation and prosecution capabilities to deal with corruption in government;
   f. developing career education programs in schools;
   g. providing individualized treatment for drug offenders and abusers at the community level.
3. Police. The delivery of police services should be improved at local levels by
   a. consolidation of all police departments with fewer than ten sworn officers;
   b. enhancement of the role of the patrolman; increased crime prevention efforts by police working with and in the community;

system, community crime prevention, police, courts, corrections, criminal code revision and reform, and hand guns.

F. Summary

The national response to the epidemic of crime has been, over the past 7 years, to drown it in money. By 1973 it was obvious that good money was being thrown after bad in hopes of effectuating rapid and dramatic reductions in the incidences of crime. In that year former Administrator Charles Rogovin wrote that "the program has accomplished little beyond the maintenance of the mediocrity which prevails

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c. affirmative police action to divert public drunks and mental patients from the criminal justice system;

d. increased employment and utilization of women, minorities, and civilians in police work;

e. enactment of legislation authorizing police to obtain search warrants by telephone.

4. Courts. The Commission's proposals for courts were aimed at streamlining the process of determining guilt and included recommendations for

a. trying all cases within 60 days of arrest;

b. requiring judges to hold full days in court;

c. unification within the state of all courts;

d. allowing only one review on appeal;

e. elimination of plea bargaining;

f. screening of all criminal cases coming to the attention of the prosecutor to determine if further processing is appropriate;

g. diverting out of the system all cases in which further processing by the prosecutor is not appropriate, based on such factors as the age of the individual, his psychological needs, the nature of the crime, and the availability of treatment programs;

h. elimination of grand juries and arraignments.

5. Corrections. Starting with the basic assumption that most existing corrections systems are schools of crime, the Commission proposed fundamental restructuring of the penal system, including

a. restricting construction of major state institutions for adult offenders;

b. phasing out all major juvenile offender institutions;

c. elimination of disparate sentencing practices;

d. establishment of community-based correctional programs and facilities;

e. unification of all correctional functions within the state;

f. increased salary, education, and training levels for corrections personnel.

6. Criminal Code Revision and Reform. The Commission proposed that all states review their criminal codes, establish permanent code revision commissions and decriminalize certain offenses, including vagrancy and drunkenness.

7. Handguns. To eliminate the dangers posed to society by the widespread possession of handguns, the Commission recommended eliminating the importation, manufacture, sale, and private possession of handguns by 1983.

in the effort America has made to prevent crime and provide criminal justice."[41]

It remains to be seen whether the changes enacted by Congress in the Crime Control Act of 1973, the redefined roles of the federal and state establishments, and the increased involvement of the citizenry will have a significant positive effect on the nation's crime rates. Whatever the result, the die has been cast—the federal government has made a commitment to criminal justice on which the states have become dependent. The federal government can no more "walk away" from this commitment than it can extricate itself from aid to education.

This, then, was the overall development of LEAA from its inception. As on the national level, the state planning agencies encountered many difficulties and a few successes. The focus will now shift to Mississippi's use of LEAA funds to assist the courts—the subsystem of adjudication in the criminal justice system.

II. The Mississippi Division of Law Enforcement Assistance (MDLEA)

Many of the problems concerning the expenditure of LEAA funds which were discovered by the House subcommittee nationally, exist on a smaller scale in Mississippi. Until recently the major emphasis of Mississippi's LEAA program has been providing police departments with new hardware and increased training. No one can fault monies spent for increased police protection, but a problem does exist when not enough funds are being appropriated to improve the adjudicatory process. In the past few years there have been moves toward correcting this imbalance; they should continue and should be accelerated.

A. Establishment

In 1968, in response to the appeal by President Johnson,[42] Governor John Bell Williams created the Office of Coordinator, Federal-State Programs.[43] The responsibilities and activities of this office include providing liaison among federal, state, district, and local organizations; organizing and conducting meetings between federal and state agency representatives; serving as the central contact point in state government with the Southeastern Federal Regional Council; and serving as the central state source for information on federal programs.[44]

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[41] Rogovin, *supra* note 4, at 25.

[42] H.R. Exec. Doc. No. 407, *supra* note 1.

[43] Exec. Order No. 29 (Miss. 1968) quoted in Division of Law Enforcement Assistance, Office of the Governor, 1975 Mississippi Comprehensive Plan at D-2 (1975).

[44] 1975 Mississippi Comprehensive Plan at D-2 to -3 (1975).

Currently, eight federally funded divisions are structured within the Office of the Governor under the general fiscal and administrative supervision of the Office of Coordinator of Federal-State Programs: the Division of Law Enforcement Assistance, the Governor's Highway Safety Program, the Office of Education and Training, the Division of Appalachian Development, the Division of Comprehensive Health Planning, the Division of Economic Opportunity, the Mississippi Council on Aging, and the Office of Community Development and Housing. The role of some of these offices is peripheral to criminal justice system planning but the fundamental responsibility of the Office of the Coordinator is to eliminate duplication of planning and program development.[45]

The Mississippi Division of Law Enforcement Assistance (MDLEA) was established within the Office of the Governor in March 1969, by Executive Order No. 44, modified by Executive Order No. 159 in November, 1973. Executive Order No. 159 details the primary responsibilities of MDLEA as follows:

> (i) To develop a comprehensive plan for the improvement of criminal justice within the State.
> (ii) To establish priorities for criminal justice improvement in the State; to provide information to prospective grant recipients on the benefits of programs and procedures for grant application; to encourage grant proposals from local units of government for criminal justice planning and action efforts; to evaluate local applications, award funds, monitor programs, and audit expenditures of grants by State and local units of government; to encourage cooperative arrangements; to coordinate Mississippi's criminal justice plan with other State federally supported and related programs; to collect data and statistics relevant to criminal justice in the State; and, to oversee the total State effort in criminal justice improvement.
> (iii) To apply for and accept grants from the Law Enforcement Assistance Administration and to approve expenditure and reimbursement of any such funds acquired in consistency with appropriate Acts, the Constitution and the laws of the State of Mississippi.
> (iv) To apply for and accept grants from any public or private source for the purpose of comprehensive criminal justice planning, implementation, and innovation in law enforcement and criminal justice administration, and to expend such funds in a manner consistent with the Constitution and the laws of the State of Mississippi.[46]

Since its creation MDLEA has markedly increased its staff size,

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[45] *Id.* at D-3.

[46] MISSISSIPPI DIVISION OF LAW ENFORCEMENT ASSISTANCE, STATE OF THE STATE ON CRIME AND JUSTICE 6 (1974).

from 14 in 1969, to 56 in 1974, or approximately 300 percent.[47] Federal funds received annually have also increased dramatically.[48]

B. Structure and Responsibilities

Under direct guidance of the Office of the Coordinator, the MDLEA consists of two major functional components or departments: the Department of Program Management and the Department of Financial Management. The Executive Director, who is appointed by, responsible to, and serves at the pleasure of the Governor, is the principal officer of MDLEA.

Under the 1968 Crime Control Act an integral part of the state's responsibility is planning for crime reduction and criminal justice system improvement. Comprehensive planning is the process by which the state or locality studies the crime problem in its jurisdiction, evaluates available resources, and outlines a course of action toward the achievement of specific crime reduction and criminal justice improvement goals. MDLEA receives an annual federal planning grant of $200,000 plus additional planning funds determined on the basis of the state's population. These funds support both the operation of MDLEA and the regional and local planning units, which constitute an important part of the comprehensive planning effort. These local planning units assist in identifying local criminal justice problems and in developing programs to meet specific local needs. MDLEA currently supports four regional offices and several local committees to elicit priorities for improving Mississippi's system and which, concurrently, give voice to the "grass roots" elements in the state.

MDLEA employs two techniques in developing its annual comprehensive plan: Criminal justice improvement and crimes-specific planning. The criminal justice improvement planning approach is generally defined as an effort to develop programs which will lead to the overall upgrading of the system. Crimes-specific planning is an approach tied directly to the reduction of a specific crime in a specific geographic area.[49]

Regardless of the approach or how it is used, MDLEA goes through a planning process each year. This process is usually designed to take maximum advantage of input from the MDLEA supervisory board, local and regional planning units, and other local criminal justice officials throughout Mississippi. The initial phase involves a substantial data collection effort aimed at identifying key criminal justice and law enforcement problems in the state. Once the data is collected it is ana-

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[47] *Id.* at 7.
[48] *Id.* at 14. See Appendix II.
[49] MISSISSIPPI DIVISION OF LAW ENFORCEMENT ASSISTANCE, *supra* note 46, at 9.

lyzed and reviewed by MDLEA and regional staffs and by individual units of local government. In the next major phase, key elements of the comprehensive plan (problem area description, setting goals, and priorities in designing action programs) are reviewed and discussed for MDLEA staff and regional planners to determine policy direction for the MDLEA supervisory board. Completing the cycle, programs are implemented, monitored, and evaluated.

C. The Adjudication Subsystem

Initially, as a result of police officials constituting over half of the state planning board, the majority of the funds were spent on police projects. As Charles Rogovin, former Director of LEAA, stated:

> [T]he lack of effective participation by members of the judiciary in many states was a substantial disappointment. They were often constrained by a traditional and exaggerated concept of judicial independence, misunderstood Congress' intent that reform in Court activities and operations was an important objective of the program, and were unwilling to share decision-making authority. This changed as judges realized the desirability of their participation, and police and correctionaries recognized the benefits in having the insights and experience of the judiciary. A fair stimulus to increased involvement was judicial recognition of increasing amounts of Federal money available for expanded personnel, facilities, and services in the courts.[50]

Mississippi has only recently begun to allocate even 20 percent of its action funds to court improvement projects. In previous years the amount was much less.[51] Under MDLEA's 1974 Comprehensive Plan, $1,010,000 was alloted to "adjudication."[52]

> The term *adjudication* is used to describe those activities included in the adjudicative process, i.e., prosecution, defense, court management, judicial operations, etc. Within this structure, judicial services are sponsored for administrative assistance, legal information, research, and training and education for judicial officers. Similar services are offered to prosecutors in the State to enhance the prosecution function. In addition, MDLEA provides law student interns from the University of Mississippi Law Center for prosecutors, public defenders, and youth court judges.[53]

For adjudication, the program emphasis is on the need to upgrade, train, and educate its personnel with respect to the current "state of the

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[50] Rogovin, *supra* note 4, at 23-24.

[51] See Appendix III.

[52] MISSISSIPPI DIVISION OF LAW ENFORCEMENT ASSISTANCE, *supra* note 46, at 17.

[53] *Id.*

art" court management administration and practices and in the provision of incentives to local courts for self improvement through courtroom enhancement.

III. Program Implementation

The need for improvement in the sphere of adjudication is great. In recognition of this need programs have been implemented in four major areas of the adjudication process: Support of law internships, support of defense services, support of prosecution services, and support of judicial services.

A. Law Internships

The objective of this program is to upgrade the adjudication subsystem of the criminal justice system by providing practical experience to future prosecutors, public defenders, and attorneys. This program is implemented by providing a legal internship capability within the University of Mississippi Law Center. Senior law students are thus able to combine academic knowledge of criminal law with practical work experience in the offices of prosecutors, public defenders, and youth court judges. Mississippi's courts and court-related systems are enhanced, therefore, through the influx of young attorneys who possess not only academic qualifications but professional experience as well. This program is funded by a subgrant to the University of Mississippi Law Center to train 25-40 student interns per semester. In fiscal 1974, this grant was increased to $100,000.[54]

B. Defense Services

This program's objective was to provide quality representation of indigents charged with a crime through the support of public defender offices. Pilot projects in local public defense offices and training of public defenders were to be supported. Although the 1975 legislation authorizing the offices was vetoed, funds programmed for this project will be used for training defenders in the state's local public defender offices and for the "defense" aspects of a comprehensive court study.[55]

C. Prosecution Services

The objectives of this program are twofold: First, to improve the organization, management, and administration of the prosecutive function within the state, mitigating the problems of prosecutors occasioned

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[54] Division of Law Enforcement, *supra* note 43, at E-13.

[55] *Id.* at B-107, C-45, E-13.

by lack of a centralized administrative control; second, to improve the education and training opportunities for prosecutors and their staffs. The program is aimed at 235 persons.[56] A continuing education program for Mississippi's prosecutors is provided by a subgrant to the University of Mississippi Law Center. The subgrant supports the Mississippi Prosecutor's Association in its projects for planning, education, and training as well as in the development of manuals, handbooks, and related materials.

D. Judicial Services

This program is designed for judges and judicial support personnel.[57] The objective is to improve the functional efficiency of the judicial arm of the court system by direct support and by attempting to provide continuing educational opportunities for all judicial and judicial support personnel. Administrative assistance will be supported along with judicial planning and research functions.

This activity, the largest both in program implementation and receipt of funds, can be categorized into four areas: Information and education for the public concerning the work, problems, and needs of the state's judicial system; funding, at the circuit court level, of locally based projects in court administration; Criminal Justice Research Service; and the Mississippi Judicial College.

To provide information and education for the public concerning the work, problems, and needs of the state's judicial system, MDLEA has sponsored Citizens' Conferences on the Judiciary, conducted by the Mississippi Judicial College. These conferences brought together a cross section of Mississippi citizens for discussions on ways to improve the judiciary[58] and provided a springboard for future citizen involvement in judicial reform and modernization. In addition, locally based projects in court administration are being implemented by grants to court administration projects in the Second and Nineteenth Circuit Court Districts. These projects are in their second year.

Legal research capabilities are provided for all individuals in the state court system by the Criminal Justice Research Service, a research activity within the University of Mississippi Law Center. In its initial year of operation (1973) this service processed approximately 500 requests for information[59] and in fiscal 1974 approximately 1000. This

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[56] *Id.* at C-43.

[57] Support personnel include court reporters, court clerks, county supervisors, registrars of voters, county jury commissioners, youth court referees, youth court counselors, and court administrators.

[58] DIVISION OF LAW ENFORCEMENT, *supra* note 43, at A-248.

[59] *Id.* at A-249.

service is especially effective in an essentially rural state such as Mississippi because many of the judges and prosecutors do not have access to adequate law libraries, and it is often difficult for them to obtain research information.[60]

The largest subgrant in this area was received by the Mississippi Judicial College at the University of Mississippi Law Center. The objective of the Judicial College is to improve the delivery of judicial services to the citizens of Mississippi by upgrading the state's court system by providing intensive education and training for the personnel of the judicial branch of Mississippi government, providing continuing research leading to modernization of court procedures, and publishing reference aids and instructive material for court management and operation.

The Judicial College has begun implementation of these goals by presentation of in-state training and education programs for trainees, including justices of the Mississippi Supreme Court; judges of the chancery, circuit, county, municipal, youth, and family courts; justices of the peace; and clerks and deputy clerks from all of the enumerated courts. Additionally, programs were conducted for court-support personnel such as reporters and constables. In fiscal 1974, 10 programs were presented, serving 878 trainees. The Judicial College has also sponsored out-of-state training for court personnel at approved out-of-state training programs and seminars, including the National College of the State Judiciary, the National College of Juvenile Justice, the American Academy of Judicial Education, the Institute for Court Management, and other similar judicial training functions. In fiscal 1974, 81 trainees were sent to out-of-state conferences. Research and publication is also sponsored by the Judicial College. At the request and direction of its Board of Governors it undertook to prepare and distribute a modern compilation of model jury instructions. It also is updating and revising a handbook for Mississippi justices of the peace and researching, drafting, printing, and distributing a judges' benchbook on evidence. Additionally, a trial jurors' handbook and a youth court handbook are being prepared for publication.

IV. Recommendations

While a review of these planned and existing programs demonstrates some federal and state monies are now being appropriated for judicial improvement projects, it is equally demonstrable that other problem areas exist in which available funds could be used more effectively. The following brief outline of prospective programs will hopefully serve as a springboard for the discussion, investigation, and

[60] *Id.*

eventual adoption of programs in these areas.[61]

In 1968, the Mississippi Judiciary Commission was created by the Mississippi Legislature and charged with making a complete survey of Mississippi's judicial system. This task was accomplished in 1970.[62] The commission was the first to make such a comprehensive study of Mississippi's judiciary. Together with a statistical analysis, the commission made numerous specific recommendations for the improvement of the judicial system. These recommendations were subdivided into nine categories:[63] The general administration of justice, improvement of the administration of criminal justice, judicial redistricting, personnel, improvement of youth courts, upgrading justice of the peace courts, appellate work, revising the Code, and for further study. Of the 43 suggestions made by the commission only the following have been even partially implemented: Creation of the office of administrator of the courts, revesting the rulemaking power in the courts, providing adequate compensation for the judiciary, revision of the Code, and requiring high school diplomas for justices of the peace. Even though relatively few of these recommendations have been implemented, some of them could be effectively accomplished with MDLEA resources.

The commission found that Mississippi courts do not operate their nonjudicial administrative business efficiently.[64] On the trial level, more court administrator offices could be established. At the state supreme court level, an office of court administrator could be created to handle administrative matters that now occupy as much as 60 percent of the chief justice's time. Additionally, this office could collect statistical data and become the official organ for formulating recommendations on court system improvements. The establishment in 1974 of the Office of the Executive Assistant to the Supreme Court was a positive step toward more efficient administration of judicial business.

Presently, however, no effective court management program exists; absent a comprehensive state plan, all changes are effected on a piecemeal basis. Mississippi's court system is fragmented, jurisdictions are conflicting and overlapping, and caseloads are disproportionate; all due to a lack of planning.[65] Court management plans should take into account and include the following: collection, compilation, and analysis of data on the workloads of the courts; reporting on the status and needs

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[61] The recommendations in the following sections were primarily derived from the 1970 REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION, *infra* note 62, and the 1975 MISSISSIPPI COMPREHENSIVE PLAN, *supra* note 43.

[62] REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION TO THE 1970 REGULAR SESSION OF THE LEGISLATURE OF THE STATE OF MISSISSIPPI (1970).

[63] *Id.* at 4-8.

[64] *Id.* at 9.

[65] DIVISION OF LAW ENFORCEMENT, *supra* note 43, at B-54.

of the courts to the legislature; recommending to the legislature necessary reforms within the judicial structure; establishing and implementing procedures for temporary assignment of judges to other districts; and requiring mandatory uniform data reporting from chancery, circuit, and county courts.[66] Perhaps this final function of data gathering would be the most important duty of a court administrator. The latest gathering of any substantial amount of data was in 1969 by the Mississippi Judiciary Commission, obviously outdated. Court-improvement planning is almost impossible without current empirical data on the judicial system. MDLEA could fund a comprehensive courts study to fill this need.

MDLEA could also finance a project of revising present court practices in relation to pleading, practice, and procedure. Present rules of pleading and practice vary from district to district, are antiquated, and make practice on the trial level unnecessarily difficult. To alleviate this problem uniform rules are needed in both chancery and circuit courts. If it is apparent that the legislature is not structured to effectively promulgate uniform rules and remain flexible enough to modify or remake these rules if necessary,[67] the Mississippi Supreme Court, through its inherent power, could promulgate appropriate rules to bring uniformity to these areas.[68] MDLEA could fund a commission established under the auspices of the court to study these areas and thus facilitate the rule-making process.

A similar comprehensive study of chancery and circuit court clerk's offices could lead to uniformity in administrative and record keeping systems. The lack of uniformity often results in confusion, as whether filing fees will be required without a motion for security of costs or whether recording fees will be required prior to recording. The advantages of uniformity are obvious; for example, an attorney would be able to anticipate and prepare for appropriate filing, regardless of the county; he also would be able to anticipate the types of dockets available or the type of land recording system used. Through the Mississippi Judicial College, seminars could be held for all clerks at which a system of uniformity could be formulated, and ideas of especially efficient methods of managing a clerk's office could be exchanged.

Another recommendation of the commission, being vigorously pursued by the Mississippi Judicial College, is the upgrading of Mississippi's justices of the peace through education and training programs.[69] Other states have already begun such programs.[70] Since 1970, the Judi-

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[66] *Id.* at B-55.

[67] Act of April 7, 1975, ch. 501, §§ 15-21, [1975] Gen. Laws Miss.

[68] *See* Newell v. State, 308 So. 2d 71 (Miss. 1975), *noted in* 46 Miss. L.J. 849 (1975).

[69] Report of the Mississippi Judiciary Commission, *supra* note 62, at 9.

[70] Gazell, *A National Perspective on Justices of the Peace and Their Future: Time for an Epitaph?*, 46 Miss. L.J. 795 (1975).

cial College has presented over a dozen seminars for justices of the peace. The Judicial College also plans to assist the attorney general's office in the presentation of statutorily required training programs and will begin monthly televised educational programs for justices of the peace, and the distribution of working materials for each program. This, however, is only a beginning; these programs should be expanded and others instituted to improve the quality of justice administered by justices of the peace.

The commission also recommended the establishment of a public defender system.[71] The need here is especially great. The present system of court-appointed representation is inefficient and because of the burden to private practitioners, often ineffective. Although three public defender bills were filed in 1973, only one reached the governor; it was vetoed.[72] Federal funds are now available for this type of program and are awaiting legislative action to approve the necessary state complementary funds.

Other proposals, not specifically mentioned by the commission, but appropriate for expenditures of MDLEA resources, include continued training on contemporary judicial practice and procedure for judicial and support personnel. To meet this need, a more comprehensive continuing education program should be established. Some judges and court-support personnel have attended seminars on topics such as judicial opinion writing; computer applications in juvenile justice; and current developments in evidence, sentencing, search and seizure, traffic, court administration, and appellate procedure. Hopefully, instruction in these areas will continue.

Unfortunately, not all court and court-related personnel are adequately exposed to the latest practices and procedures. To remedy this the Mississippi Judicial College seminars and training sessions should emphasize these practices and procedures to increase judicial expertise and efficiency; consideration should be given to requiring mandatory attendance at such sessions.

In the area of prosecution, existing provisions relating to managerial functions, caseloads, and training are inadequate for maximum resource utilization. Recently, the legislature established criminal investigatory assistance for full-time district attorneys. Supplemental funds for investigators are also available to full-time district attorneys through MDLEA.[73] Caseloads are so heavy in some districts that the district attorney quite often sees a felony case for the first time as it is being

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[71] The Judiciary Commission recommended such a seminar in its 1970 report. REPORT OF THE MISSISSIPPI JUDICIARY COMMISSION, *supra* note 62, at 48.

[72] DIVISION OF LAW ENFORCEMENT, *supra* note 43, at A-214.

[73] *Id.* at B-58.

presented to the grand jury. No management studies have been made to identify problems, describe operating procedures, determine needs, or prescribe recommended changes. MDLEA funds could be used for such a study. Additionally, prosecution positions should be full-time, and training programs, especially in the area of office management, should be emphasized.

Law students often enter the judicial system inadequately trained because of their lack of practical experience. The law internship program prepares such students by giving them this experience. Therefore, the program should be continued and expanded.

Finally, the absence of statewide diversionary programs (programs which provide alternatives to incarceration) results in increased costs in offender treatment programs. Development of a statewide program should be encouraged, and the only existing diversionary program, the Jackson County Public Offender Program, should continue to be supported. In this program selective cases are referred to the Vocational Rehabilitation Office.[74] Each individual placed in the state penitentiary costs the taxpayers approximately $3.25 per day. Under this program, persons placed on probation cost only 70 cents per day—a significant saving.[75]

Conclusion

Although LEAA was granted generous funds with which to fight crime, crime rates have not decreased. Part of LEAA's difficulties stemmed from the fact that huge amounts of funds were poured into specific areas such as riot prevention and crowd control before an overall plan was developed to cope with the entire criminal justice system. It is now apparent that much funding was wasted. It is equally apparent that the federal government has committed itself to continue the funding. These funds must now be spent in more useful pursuits. LEAA's establishment of Standards and Goals demonstrates a similar realization. Hopefully, more can now be expected in the way of effective use of the taxpayers' funds.

Mississippi's use of federal funds was also initially without coherent direction. However, some trends and patterns are developing. Fewer funds are now being expended on hardware. The emphasis is shifting to the entire criminal justice system, especially the judiciary. The report of the Mississippi Judiciary Commission was a fundamental step forward in identifying goals. Although the director of MDLEA still serves at the pleasure of the governor, Executive Order No. 159 specifically

[74] *Id.* at A-222.
[75] *Id.* at A-225.

meets the nationally identified problems of evaluation, program monitoring, and expenditure auditing. MDLEA now recognizes many areas where its assistance is appropriate; it can be expected to move in those directions, to further the attempt to control crime, and to improve the administration of justice.

Appendix I

The following chart illustrates Louisiana's earnings accrued by investing block grant funds in U.S. Treasury bills between April 15, 1970 and July 1, 1971:

LOUISIANA COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF CRIMINAL JUSTICE SCHEDULE OF INTEREST EARNED FROM INVESTMENTS IN TREASURY

Date purchased	Date matured	Discount rate, percent	Cost	Value at Maturity	Amount earned
Apr. 15, 1970	May 14, 1970	5.90	$99,524.72	$100,000	$475.28
May 13, 1970	June 11, 1970	6.05	1,492,689.59	1,500,000	7,310.41
June 11, 1970	July 9, 1970	5.70	746,675.00	750,000	3,325.00
July 9, 1970	Aug. 6, 1970	5.60	497,822.22	500,000	2,177.78
Aug. 6, 1970	Aug. 31, 1970	5.50	1,311,969.80	1,317,000	5,030.20
Sept. 2, 1970	Oct. 1, 1970	5.90	995,252.22	1,000,000	4,747.78
Oct. 1, 1970	Oct. 29, 1970	5.25	1,991,833.34	2,000,000	8,166.66
Oct. 30, 1970	Nov. 27, 1970	4.80	1,494,400.01	1,500,000	5,599.99
Nov. 27, 1970	Dec. 31, 1970	4.30	1,493,908.34	1,500,000	6,091.66
Dec. 31, 1970	Jan. 28, 1971	4.25	1,495,041.66	1,500,000	4,958.34
Jan. 28, 1971	Feb. 25, 1971	3.80	997,044.44	1,000,000	2,955.56
Feb. 25, 1971	Mar. 25, 1971	2.90	498,872.22	500,000	1,127.78
June 2, 1971	July 1, 1971	3.90	99,685.83	100,000	314.17
Do	do	3.90	49,842.92	50,000	157.08
July 1, 1971	July 31, 1971	4.50	49,812.50	50,000	187.50
Do	do	4.50	49,812.50	50,000	187.50
Total			13,364,187.31	13,417,000	52,812.69

APPENDIX II
MDLEA Federal Funding

LEAA Category	1969	1970	1971	1972	1973	1974	Total
Action	$288,405	$2,117,000	$3,614,000	$4,451,000	$5,166,000	$5,166,000	$20,802,405
Planning	257,950	280,000	318,000	417,000	620,000	620,000	2,512,950
Part E	0	0	269,000	524,000	608,000	608,000	2,009,000
Part C Discretionary	0	153,500	295,000	267,200	0	300,000	1,015,700
Part E Discretionary	0	0	239,000	1,159,099	2,199,815	7,200	3,605,115
LEEP	44,000	195,585	211,440	223,113	416,054	352,721	1,442,913
Other Discretionary	130,000	0	465,588	0	70,192	219,697	1,065,477
TOTAL	$720,355	$2,746,085	$5,592,028	$7,041,412	$9,090,061	$7,273,618	$32,453,559

Appendix III

This chart was compiled from the LEAA annual reports for 1970-1974 and the MDLEA report for 1974.

Year	Action Funds Available	Funds Spend in Court Improve-Ment Projects	Percentage
1970	$2,117,000	$41,970	1.98
1971	3,614,000	343,339	9.5
1972	4,451,000	150,000	3.37
1973	5,166,000	420,131	8.13
1974	5,166,000	1,010,000	19.55

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RECENT DECISIONS

STATE COURTS—RULEMAKING—MISSISSIPPI SUPREME COURT ASSERTS RULEMAKING POWER

Appellant, after being convicted of assault and battery with intent to kill, appealed to the Mississippi Supreme Court alleging that the jury was left uninstructed regarding the burden of proof required for conviction, and that Mississippi's statutory scheme of procedure prevented the trial judge from correcting the omission.[1] The supreme court declared the instruction statute void and substituted a new rule allowing trial judges to initiate jury instructions. *Held*, the supreme court is in a better position than the legislature to promulgate rules of procedure, that the court has the constitutional power and duty to do so, and that the court will do so when statutory rules operate in derogation of justice. *Newell v. State*, 308 So. 2d 71 (Miss. 1975).

Anglo-American rules of procedure originated in tribunal custom in the medieval English courts;[2] these customs matured into rules of court, kept current by the judiciary.[3] Court-made rules remained dominant in England down to the time of the revolution,[4] and the colonial courts relied on this tradition of common law pleading in establishing their own systems of practice and procedure.[5] By the turn of the 18th century, however, American courts were moving away from the tradition of common law pleading, influenced by two coincident factors. First, common law pleading had become highly complex and calcified;[6]

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[1] MISS. CODE ANN. § 99-17-35 (1972). A parallel civil instruction statute, *id.* § 11-7-155, also referred to by the court, presumably was expunged by the holding in *Newell*. Examples of the effects of these statutes are found in the cases cited and discussed at note 38 *infra*.

As early as 1889 the Mississippi practice limiting jury instructions to those profferred by counsel, MISS. CODE ANN. §§ 11-7-155 (civil), 99-17-35 (criminal)(1972), was noted outside the state as a curiosity of American jurisprudence. *See* Brown, 12 A.B.A. REP. 265, 281-82 (1889), *cited in* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 38-39 (1952).

The rule was strictly enforced subsequent to coming into the Code in 1857 (MISS. CODE ch. 61, art. 161); Griffith, *Charging the Jury*, 8 MISS. L.J. 182 (1935); *see, e.g.*, Gangloff v. State, 99 So. 2d 461 (Miss. 1958).

The *Newell* court, observing that "juries are at times left groping blindly . . . for the law," Newell v. State, 308 So. 2d 71, 74 (Miss. 1975), found the rule to be "an impediment to the administration of justice." *Id.* at 74-75 & n.2.

[2] Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

[3] *Id.*

[4] Pound, *supra* note 1, at 35 n.18.

[5] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 126-27 (1973); V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE 9 (2d ed. 1950); Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287, 290 (1972); *see* Commercial Bank v. State, 12 Miss. 439, 513 (1845).

[6] L. FRIEDMAN, *supra* note 5, at 129; Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect*, 20 MISS. L.J. 1 (1948). Some rules date to 1594. Pound, *supra* note 1, at 35 n.18.

simplification inevitably occurred in the embryonic American legal system.[7] Second, and more significantly, the legislature emerged as the dominant governmental branch. Parliament began this rise with the revolution of 1688.[8] Subsequently, it involved itself in court procedure[9] and eventually took full control of English court pleading, not relinquished until 1873.[10] In the United States a parallel rise in the importance of the legislature was fueled by Jacksonian populism,[11] which featured the "idea of omnicompetence of the legislature . . . . [T]he state legislatures took over the details of legal procedure which, for the most part of Anglo-American legal history, had been left to rules of court."[12] A practical and beneficial result of such "code" pleading was the reform of pleading into simpler forms more likely to lead to judgment on the merits than on technicalities of procedure. New York's Field Code of Civil Procedure,[13] adopted in 1847 as an attempt at simplification, was the most influential. By 1900 at least 23 states and 1 territory had adopted or largely borrowed it;[14] all but 3 states had instituted some form of code pleading.[15] Yet, at the same time the Field Code was falling of its own weight,[16] as the modern movement toward more flexible court supervision of rules gained strength. In 1921 Justice Cardozo severely criticized legislative rulemaking,[17] and in 1926 Dean Pound wrote the definitive case for judicial rulemaking.[18] Less than a decade later the United States Supreme Court assumed the rulemaking power for civil procedure[19] and

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[7] L. FRIEDMAN, *supra* note 5, at 126-27; *see* THE FEDERALIST No. 48, at 311 (New Am. Lib. ed. 1961) (J. Madison), *quoting* T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195.

[8] Pound, *supra* note 2, at 599.

[9] *Id.*

[10] *Id.*

[11] *See* 1 R. HOFSTADER, GREAT ISSUES IN AMERICAN HISTORY 249, 252 (1958).

[12] Pound, *supra* note 1, at 34-35. *See* Franck, *supra* note 5, at 291.

[13] Pound, *supra* note 1, at 31.

[14] L. FRIEDMAN, *supra* note 5, at 346.

[15] *Id.*

[16] By 1890 the Code had grown to 3,441 sections. Pound, *supra* note 1, at 31. The New York Board of Statutory Commissioners said in 1912:

> The present code system in this state of regulating details of practice by statute . . . has so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment.

Id. at 31, *quoting* REPORT OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK, A PLAN FOR THE SIMPLIFICATION OF CIVIL PRACTICE 29 (1912).

[17] [T]he legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the working of one rule or another, patches the fabric here and there, and mars often when it would mend.

Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921). For further criticisms, see AMERICAN JUDICATURE SOC'Y, A STUDY OF THE PROCEDURAL RULEMAKING POWER IN THE UNITED STATES 4-5 (1973); Pound, *supra* note 1, at 32, 44-45; Note, *The Judiciary and the Rule-Making Power*, 23 S.C.L. REV. 377, 379 (1971).

[18] Pound, *supra* note 2.

[19] The Rules Enabling Act, 20 U.S.C. § 2072 (1970) (originally enacted as Act of June 19, 1934, ch. 651, §§ 1-2, 48 Stat. 1064).

postverdict criminal proceedings.[20] It later adopted rules for preverdict criminal proceedings.[21] Today code pleading remains universal but the courts, rather than the legislatures, supervise the codes in most cases. As of January, 1975, the courts of 48 states had promulgated rules of appellate procedure; 42, rules of civil procedure; and 35, rules of criminal procedure.[22] The reason for the turnaround is implicit in the demise of the Field Code: the codes were installed to simplify procedure, but the legislatures were unable to exercise efficiently the specialized and complex plenary rulemaking power,[23] for they lacked the flexibility necessary in a dynamic system.[24]

Territorial Mississippi adopted common law pleading based on the English model.[25] Mississippi pleading reached such a state of complexity by 1850 that "it was a considerable triumph to get to the jury . . . ."[26] Jacksonian populism[27] and legislative primacy[28] marked the court's early relationship with the legislature. This trend was exacerbated in Mississippi by resentment among small

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[20] 18 U.S.C. § 3772 (1970) (originally enacted as Act of Feb. 24, 1933, ch. 119, §§ 1-3, 47 Stat. 904).

[21] Although authorized by the 1933 Act, the Federal Rules of Criminal Procedure were not promulgated until 1944. Order of Dec. 26, 1944, 323 U.S. 821.

[22] AMERICAN JUDICATURE SOC'Y, USES OF THE JUDICIAL RULE-MAKING POWER 5 (1975).

[23] *See, e.g.*, THE FEDERALIST No. 81, at 483-84 (New Am. Lib. ed. 1961) (A. Hamilton); Cardozo, *supra* note 17, at 113-14.

[24] Legislative rules systems have been characterized as rigid and unresponsive to changing policies and situations; ambiguous; composed without benefit of expertise, by legislators not responsible in the public eye for efficient court rules, who meet too seldom to exercise meaningful supervision of a dynamic system of rules, and who are tempted to play politics with the rulemaking power. Joiner & Miller, *Rules of Practice and Procedure: A Study in Judicial Rule-Making*, 55 MICH. L. REV. 623, 642-43 (1955); *see* THE FEDERALIST No. 81, at 483-84 (New Am. Lib. ed. 1961) (A. Hamilton); Pound, *supra* note 1, at 30.

> [R]egulation of procedure by rules of court is the way to insure a simple effective procedure, attained by gradual and conservative overhauling and reshaping of existing practice. . . . [I]n this way new demands upon the machinery of judicial administration may be met promptly by the ordinary means of legal growth, instead of waiting vainly for years for intervention of the legislative *deus ex machina*.

Pound, *supra* note 2, at 602.

[25] Common law pleading was incorporated in the ordinance designating the Mississippi Territory. Boarman v. Catlett, 21 Miss. 149, 152 (1849). *See* J. LYNCH, THE BENCH AND BAR OF MISSISSIPPI 14 (1881).

[26] J. BALDWIN, FLUSH TIMES OF ALABAMA AND MISSISSIPPI, *quoted in* Griffith, *supra* note 6, at 2.

[27] For a discussion of Jacksonian populism, see R. HOFSTADER, *supra* note 11, at 249.

[28] Newell v. State, 308 So. 2d 71, 74 (Miss. 1975); see text accompanying note 12 *supra*.

The extent of early legislative domination of the judiciary is illustrated by the circumstances of Justice Richard Stockton's descent from the High Court bench in 1825, as reported by Thomas Lynch, chronicler of the early Mississippi bench and bar. When Stockton held unconstitutional and inoperative an act of the legislature, a legislative committee was convened which not only forced his resignation, but reviewed his judgment, and reversed it. J. LYNCH, *supra* note 25, at 93-97.

farmers and merchants of the concentration of power among the planter class.[29] The lower and middle classes preferred to vest powers in the legislature, where the planters were in the minority.[30] By the middle of the 19th century, this populist sentiment coincided with the national movement to simplify procedure through codification; Mississippi abolished common law pleading by legislative act[31] and promulgated simplified, comprehensive rules of procedure. The 1850 Act was explicitly intended to make rules of procedure accessible to the less sophisticated to lessen the advantage of a small number of accomplished pleaders who dominated the bar of their day by, in effect, never letting a case reach the merits.[32] One of the legislature's first actions subsequent to asserting control was to restore, in 1857, "nearly all of the machinery by which the parties could be unduly held or delayed in court before a trial on the actual merits."[33] These procedures survived until 1948,[34] when procedure was again simplified, by the Civil Practice Act.[35] The potential for piecemeal, legislative rulemaking was preserved by the Act: the statute provided that subsequent specific enactments would control the general provisions of the Act.[36]

The Mississippi Supreme Court's response to legislative predominance has been equivocal. The court has customarily controlled its own internal procedure,[37] and on occasion, has modified rules when justice seemed so to demand.[38]

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[29] Comments of Chief Justice Robert G. Gillespie in response to questionnaire from the American Judicature Society, Sept. 25, 1974, copy on file with the *Mississippi Law Journal* [hereinafter cited as Comments]; Newell v. State, 308 So. 2d 71, 74 (Miss. 1975).

[30] Comments, *supra* note 29.

[31] Act of Mar. 9, 1850, ch. 4, § 1, [1850] Gen. Laws Miss. 57.

[32] Griffith, *supra* note 6, at 3-5.

[33] *Id.* at 6. Interestingly, this return, at least in part to the disadvantages of common law pleading, appears to have been in response to political pressure. *Id.* at 5-6.

[34] *Id.* at 7; *see also* discussion of the Chancery Act of 1924, *id.* at 15.

[35] Act of Apr. 12, 1948, ch. 230, §§ 1-6, [1948] Gen. Laws Miss. 203. *See generally* Griffith, *supra* note 6.

[36] Griffith, *supra* note 6, at 26.

[37] Interview with Chief Justice Robert G. Gillespie in Jackson, Miss., Mar. 18, 1975, transcript on file with the *Mississippi Law Journal* [hereinafter cited as Interview].

[38] *See, e.g.*, Franck, *supra* note 5, at 299.

An interesting example is the rule in Lang v. State, 230 Miss. 147, 92 So. 2d 670 (1957). The Mississippi courts had long experienced difficulty with the form of appeals from final judgments in trial courts when facts were asserted which were not available at trial. The Mississippi Supreme Court had resorted to various machinations over the years to allow such appeals to be heard in spite of the rules. *See, e.g.*, Mahaffey v. Mahaffey, 176 Miss. 733, 738, 170 So. 289, 291 (1936); Moore v. Summerville, 80 Miss. 323, 332, 32 So. 294, 295 (1902). It became the practice to allege such new facts by affidavit. *See* Brockman v. State, 216 Miss. 314, 62 So. 2d 362 (1953) (failure to make affidavit fatal to appeal). The effect was a new trial, in the supreme court, on the newly asserted facts. The legislature attempted to change this situation by providing for a hearing at the supreme court level to determine whether the new facts would justify a writ of *error coram nobis* and a new trial below. Act of Apr. 14, 1952, ch. 250, §§ 1-10, [1952] Gen. Laws Miss. 281, Miss. Code Ann. § 1992.5 (1956). This new procedure included provisions for oral testimony and cross-examination before the court, so that, in effect, the legislature had established a trial-type hearing. Accordingly, in Wetzel v. State, 225 Miss. 450, 489, 76

Generally, however, the court "recognized the validity of the legislative power to make rules . . . in countless holdings . . . ."[39] In *Yazoo & M. V.R.R. v. Kirk*,[40] the court ruled that statutes of limitation could be raised for the first time on appeal. Later,[41] however, the court "receded" from this holding, concluding that "[t]his court has no authority to prescribe rules for the government of trial courts, and has never attempted to usurp such power."[42] In *Lewis v. State*,[43] the court stated that "[w]e have no dispensing power, and can assume none, to bend those essential rules . . . ."[44] As a result, the petitioner, who had failed to raise the question of his insanity at trial, was sentenced to be hanged without inquiry into his state of mind. *Kirk* and *Lewis*, taken together, seem to establish that the court lacks power either to promulgate rules, or to "bend" legislatively promulgated rules to avoid injustice. In practice, however, the court has not in all cases blindly followed the demands of inflexible procedure. While "the judiciary traditionally yielded to the legislature in the rule making area,"[45] the court did "fill in the gaps"[46] in the legislative rules, and, occasionally, went considerably farther.[47] The court set the stage for asserting authority to make its own rules

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So. 2d 846, 847 (1955), the court, noting that it was unable to hear extensive oral testimony, announced that it would continue its practice of receiving affidavits.

This procedure remained imperfect: new evidence on points already litigated could not be raised under section 1992.5. Faced with this imperfection in Lang v. State, 230 Miss. 147, 92 So. 2d 670 (1957), Justice Gillespie wrote for the court:

> [T]his Court has the plain duty to invoke its inherent powers and declare in simple and understandable terms just what procedure is available when a situation develops demanding that a judicial inquiry be made to determine whether a judgment should be vacated and a new trial granted.

Id. at 170, 92 So. 2d at 674. Citing no authority, the court proceeded to borrow the *Wetzel* procedural innovation for use in such cases. Justice Holmes strongly dissented, insisting that the court could make no rule extending beyond the current term of court. *Id.* at 172, 92 So. 2d at 677.

The *Lang* rule became recognized and widely followed. *See, e.g.*, Summerville v. Cook, 311 F. Supp. 931 (N.D. Miss. 1970); Kitchens v. State, 290 F. Supp. 866 (S.D. Miss. 1968); State v. Nicholson, 286 So. 2d 820, 822 (Miss. 1973); State v. Ridenger, 279 So. 2d 618, 620 (Miss. 1973); Ledbetter v. Bishop, 210 So. 2d 880, 882 (Miss. 1968); Allred v. State, 187 So. 2d 28, 30 (Miss. 1966); *see generally In re* Broom's Petition, 251 Miss. 25, 168 So. 2d 44 (1964).

[39] Comments, *supra* note 29; Franck, *supra* note 5, at 288 n.8; *see* Interview, *supra* note 37.

[40] 102 Miss. 41, 58 So. 710 (1912).

[41] *Id.* at 56, 58 So. at 834 (on suggestion of error).

[42] *Id.*

[43] 155 Miss. 810, 125 So. 419 (1930) (en banc).

[44] *Id.* at 817, 125 So. at 421.

[45] Interview, *supra* note 37.

[46] *Id.*; Franck, *supra* note 5, at 288 n.8.

[47] Examples of judicial rulemaking follow; this selection is not meant to be comprehensive, but to show the gradually expanding role which the court hewed out for itself, leading to the events of 1975. A wider selection of examples is collected in Franck, *supra* note 5, at 299; *see* Newell v. State, 308 So. 2d 71, 75 & n.2 (Miss. 1975).

As early as 1903 the court held that rules of chancery should be liberally construed rather than "permit them to be converted into a maze wherein the skillful pleader may

in *Southern Pacific Lumber Co. v. Reynolds*,[48] which held that circuit courts may promulgate rules pertaining to appeals from the county courts. Chief Justice Ethridge cited two sources of power to make such a rule: section 144 of the Constitution of 1890 and section 1664 of the Code of 1942. Section 144 is a general grant of judicial power: "The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this Constitution." The court read "judicial power" to include "the power to make rules of practice and procedure . . . ."[49] Thus, the court allotted itself not plenary power, but power only over practice and procedure. Code section 1664 was styled an additional source of authority, hinting that a statutory source was included not as a matter of necessity but as a measure of comity. Indeed, the section cited is questionable authority for the tendered proposition.[50] Of paramount theoreti-

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elude the pursuit of justice." Jackson v. Lemler, 83 Miss. 37, 45, 35 So. 306, 308 (1903). This caveat reflects the problem of procedural subtlety which the bench, bar, and legislature had been trying to solve since 1850.

Moving a bit farther toward the subordination of form to substance, Justice Cook, in Wilson v. Peacock, 111 Miss. 116, 121, 71 So. 296, 298 (1916), asserted, "The trial court has the power, and should always exercise it, to relax or suspend all court rules, to the end that litigants may be assured of a full and fair hearing . . . ."

In 1939 Justice Ethridge echoed the *Wilson* language in Dogan v. Cooley, 184 Miss. 106, 123, 185 So. 783, 789 (1939):

> Rules of practice and procedure are designed to secure the justice of the law, not to defeat it. The rules are valuable guides, and will ordinarily be adhered to and followed. But where the rules would defeat the justice of the law, and bring about results not justified or intended by the substantive law, they may be subordinated to the primary purpose of the law . . . in the interest of justice.

These dicta reflect a first phase of court independence of legislative rules: recognizing the imperfection of the simplification reforms of the last century, the court was serving notice that the ends of justice might on occasion supersede legislative predominance. Compare the above quoted language with the language of Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

The court's holding in California Co. v. Oil & Gas Bd., 200 Miss. 824, 28 So. 2d 120 (1946), and City of Meridian v. Davidson, 211 Miss. 683, 53 So. 2d 48 (1951) (en banc) (citing MISS. CONST. art. 1, § 1) illustrate a second phase, an evolving conception of the separation of powers. In each case the court refused to exercise certain powers of administrative review which, it held, the legislature could not convey upon it consistent with the separation of powers section of the Mississippi Constitution (art. 1, §1). *Accord*, Loftin v. George County Bd. of Educ., 183 So. 2d 621 (Miss. 1966).

By 1952 the court was moving beyond dictum and deriving substantive results from its independence of legislative rules. In that year a panel (which included Justice Ethridge) held in Sarell v. Schultz, Banjan & Co., 213 Miss. 427, 57 So. 2d 151 (1952), that allowing a witness to testify who had previously heard the defendant testify was not reversible error; Wilson v. Peacock, 111 Miss. 116, 71 So. 296 (1916), was quoted. Thus the court asserted sufficient independence to bend and avoid rules when it desired.

[48] 206 So. 2d 334 (Miss. 1968).

[49] *Id.* at 335.

[50] Miss. Code § 1664 (1942) (now MISS. CODE ANN. § 9-1-29 (1972). The quoted portion reads:

> Each court . . . shall also have power to arrange the business therein in a convenient manner, and to establish, from time to time, rules and orders for the

cal significance is the conclusion that "inherent" rulemaking powers of courts derive from the general constitutional grant of judicial power. This view has considerable support and is believed to be sound;[51] it persists in the court today.[52] *Reynolds* was followed in another 1968 opinion.[53] In *Board of Supervisors v. Bailey*,[54] however, the majority, while acknowledging its inherent power to appoint counsel in appropriate cases, refused to infer that it also had the power to set reasonable attorneys' fees. That power, the court reasoned, was subsumed by section 2505 of the Code of 1942.[55] This view limited the rulemaking power of the court to "gap filling."[56] The *Bailey* interpretation was followed in 1971 in *Young v. State*.[57] Section 144 of the constitution was not cited by the majority in either decision. By 1974, however, the court had returned to the *Reynolds* doctrine. In *Matthews v. State*[58] the petitioner requested advancement on the court docket of his writ for petition of *error coram nobis*, in compliance with a code provision requiring a hearing within 10 days after filing.[59] The court denied the request, stating:

> conducting of suits and pleadings and respecting all matters to be done in term time or in vacation not repugnant to law.

The omitted portions, however, involve the establishment of clerks' offices, and the section's title is "Court to control clerk's office and regulate business." Furthermore, the section, which dates at least to Hutchinson's Code of 1848, had never been cited for even a remotely similar proposition. Although the section's roots lie in a section of Hutchinson's Code seeming to vest rulemaking power in the courts, the section requires that such rules be consistant with "law"; read in light of the date of its passage, this provision seems certain to have been intended to retain plenary legislative veto over court rules. *But see* Winebury v. Salisbury, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950), where the New Jersey Supreme Court held the phrase "subject to law" in a similar constitutional grant not to make court rules subject to overriding legislation but to limit them from infringing on substantive, as opposed to procedural, legislative pronouncements.

[51] See text accompanying notes 70 through 73 *infra*; Joiner & Miller, *supra* note 24, at 628.

[52] Interview, *supra* note 37; *see* Newell v. State, 308 So. 2d 71, 76 (Miss. 1975); Matthews v. State, 228 So. 2d 714, 715 (Miss. 1974).

[53] Gulf Coast Drilling & Exploration Co. v. Permenter, 214 So. 2d 601 (Miss. 1968).

[54] 236 So. 2d 420 (Miss. 1970).

[55] *Id.* at 422-23. Section 2505 specifies when attorneys shall be provided to indigent defendants and prescribes allowable attorneys' fees.

[56] Justice Inzer, joined by Chief Justice Ethridge, dissented:

> As a matter of public policy the circuit court is vested with inherent power to do any and all things necessary to the end . . . that the orderly administration of justice may proceed unfettered . . . . If it was [sic] otherwise the legislature could, if it desired, make it impossible for the court to carry out its constitutional mandate.

Id. at 424.

[57] 255 So. 2d 318 (Miss. 1971). By the time *Young* was decided, the attorney fee provision, Miss. Code Ann. § 2505 (1942), had been amended, increasing the permissible fee for appointed counsel from a maximum of $250 to a maximum of $500. Miss. Code Ann. § 99-15-17 (1972), *as amended*, Miss. Code Ann. § 99-15-17 (Supp. 1974).

[58] 288 So. 2d 714 (Miss. 1974).

[59] Miss. Code Ann. § 99-35-145(7) (1972).

> The Supreme Court is in the best position to determine what particular cases should be advanced over other cases on the docket, but legislative suggestions concerning procedural rules will be followed unless they are unreasonable or impracticable. The inherent power of the Supreme Court to promulgate procedural rules for the efficient disposition of its case load stems from the fundamental constitutional precepts of separation of powers and the vesting of judicial powers in the Courts.[60]

The court cited only section 144 as authority. With the court in doctrinal accord, the bench and bar awaited the unequivocal assertion of *Newell*,[61] which followed in January 1975.

In *Newell* the court selected an area which needed attention[62]—the role of the bench in jury instruction. Citing *Matthews* and *Reynolds*, the court reiterated its power and duty to make or modify rules when justice so required; this much was the old "fill in the gaps" procedure.[63] Taking the first of two new steps, the court examined the source of its authority, section 144 of the constitution of 1890.[64] In exercising its role as arbiter of the constitution the court found that this grant of "judicial power" included the power to make rules of procedure, and further, that the grant "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[65] The court then took a second step addressing what it correctly identified as "the heart of the issue": "We believe no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield."[66] By "edicts of the constitution" the court could only have meant what *it construed* the constitution to direct. The power to draw the line between practice and procedure, which the court reserved to itself, is the ultimate rulemaking power.

In a purely practical sense a new approach needed to be taken to rulemaking in Mississippi; frustration with unclear rules of pleading, which too often led to decisions based on technical pleading rather than on the merits, persisted from before the 1850 reforms into this decade.[67] Limited to its facts, *Newell* represented judicial smoothing of another rough procedural edge, patchwork rulemaking which the court had been practicing for some time.[68] The patchwork

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[60] Matthews v. State, 288 So. 2d 714, 715 (Miss. 1974).

[61] Newell v. State, 308 So. 2d 71 (Miss. 1975).

[62] See text accompanying note 1 *supra*.

[63] See text accompanying note 46 *supra*.

[64] "The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for by this constitution." MISS. CONST. art. 6, § 144.

See MISS. CONST. §§ 1, 2, 146 (jurisdiction as a court of appeal), 155 (oath of judges); AMERICAN JUDICATURE SOC'Y, *supra* note 17, at 42 (stating that sections 144, 156, and 163, which deal with transfer of causes, "are the sole provisions which even indirectly relate to rulemaking").

[65] 308 So. 2d at 77.

[66] *Id.*

[67] *See, e.g.*, text following note 55 *supra*. *See generally* Franck, *supra* note 5, at 292-93; Griffith, *supra* note 6, at 3-6.

[68] *See, e.g.*, notes 37 & 38 and accompanying text *supra*. The patchwork approach

approach suffers from two fundamental disadvantages, however: First, it cannot result in relatively quick, comprehensive reform; more important, the legislature can attempt to override this form of judicial rulemaking. Second, *Newell* served notice on the bar and legislature that the court's patchwork would no longer be stopgap, but definitive, emanating from a specific source of rulemaking power, and that the rules originating from the legislature would be regarded, respectfully, as suggestions. In so doing, the court was careful to note that legislative rules would continue to be controlling until the court itself, in specific instances, substituted new ones.[69]

By asserting a *limited* rulemaking power, the court trod the correct theoretical path but created the potential for practical difficulties. The chief justifications for judicial rulemaking have been that courts have *inherent* rulemaking power[70] and that the power derives from general constitutional grants of judicial power.[71] The latter argument seems most potent[72]—in a limited-constitutional government in which all powers derive from the constitution, it subsumes the former.[73] At a minimum, some rulemaking power belongs in the courts.[74] But the federal constitutional experience, which is the model for the limited-constitutional systems of most of the states, does not support unabridged rulemaking power in the courts. Concerning appellate rules, *The Federalist* wrote, "The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter). . . ."[75] Apart from the

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has some support among the authorities. Language in *Newell* and the Chief Justice's concurrence in a subsequent decision, Haralson v. State, 308 So. 2d 222, 224 (Miss. 1975), indicated that the patchwork approach would be continued although the court would prefer a means of promulgating comprehensive rules. Such a patchwork method presupposes a procedural code with which everyone is generally satisfied; change would come in the manner of gentle evolution. *See* matter quoted at note 24 *supra*. This is not the case in Mississippi; large, complex sections of the procedural rules need refurbishing.

[69] 308 So. 2d at 76.

[70] *See, e.g.*, Note, *supra* note 17, at 382.

[71] *E.g.*, AMERICAN JUDICATURE SOC'Y, *supra* note 17, at 12; Note, *supra* note 17, at 382.

"Inherent" judicial powers have long been considered a characteristic of the separation of powers concept, *see* THE FEDERALIST No. 47, at 302-03, 304 (New Am. Lib. ed. 1961) (J. Madison, *quoting* Montesquieu), to avoid the "overruling influence of the legislature over the judiciary." *Id.*, No. 48, at 308-09, 311. (A. Hamilton).

[72] *See, e.g.*, Note, *supra* note 17, at 382.

[73] "The constitutional underpinning for the assertion of an *inherent* power in the judicial branch rests upon the separation of governmental powers." Franck, *supra* note 5, at 295.

Sources of rulemaking power other than constitutions have been identified, including statute, custom, and assumption of power (de facto). AMERICAN JUDICATURE SOC'Y, *supra* note 17, at 17. The latter two clearly will be subsumed by any constitutional source of power; to say that statutes may convey rulemaking power is to say that the constitution conveys the power, because the legislature derives its power from the constitution. The constitution, then, is the most satisfactory source of rulemaking power, not least because, ultimately, it embodies the sovereignty of the people.

[74] *See, e.g.*, Joiner & Miller, *supra* note 24, at 626, *citing* 158 A.L.R. 706 (1945).

[75] THE FEDERALIST No. 81, at 489 (New Am. Lib. ed. 1961) (A. Hamilton); *see id.* No. 83, at 496, 497.

internal rules of the Supreme Court,[76] the federal judiciary has awaited legislative enabling acts before promulgating procedural codes; this permission has been withdrawn on one occassion. That withdrawal was respected by the courts.[77] The American Bar Association in recent pronouncements has retreated from its earlier support for plenary judicial rulemaking.[78] Historically, then, judicial rulemaking is more firmly founded on practicality than theory.

> It is doubtful whether, as some have contended, the legislature lacks constitutional power to regulate procedure. It cannot be doubted that legislative regulation is *less satisfactory* than regulation by court-made rules.[79]

Thus, the court would have been on shaky historical ground had it attempted to claim a plenary rulemaking power. Additionally, the court lacked constitutional justification to preempt absolutely the legislature's role in judicial rulemaking. The Mississippi Constitution of 1890, while placing control of the judiciary in the supreme court,[80] created a legislature charged with executing public policy in the state. Certain rules of practice and procedure inevitably involve expressions of public policy. Observers have articulated a dichotomy of rulemaking power defined by the purpose of the rule being promulgated. Two broad varieties of purpose are recognized: Regulation of practice and procedure toward the efficient administration of the court system and regulation reflecting substantive public policy.[81] Procedure is said to belong to the courts, whether for

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> [T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna v. Plumer, 380 U.S. 460, 472 (1965).

[76] Chief Justice Marshall, asked by the office of the Attorney General in 1792 for the Supreme Court's rules of procedure, replied that "the Court considers the practice of the courts of the King's Bench and Chancery in England, as offering outlines for the practice of this Court; and they will, from time to time, make such alterations therein, as circumstances may render necessary." Pound, *supra* note 1, at 36 n.18, *quoting* Rule 2 U.S. (2 Dall.) 411, 413-14 (1792).

[77] The Conformity Act of 1789, Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83, gave federal courts rulemaking power, but it was withdrawn, in essence, 5 days later by Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, requiring conformity with practice in the forum state. Other legislative grants of federal rulemaking authority are listed at notes 19 through 21 and accompanying text *supra*.

The Conformity Act of 1872, Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, repealed the unused rulemaking power of the Supreme Court in common law actions and, in general, required conformity with procedure in the forum state. The Court abstained from rules promulgation thereafter until the events of 1933 and 1934. C. WRIGHT, LAW OF FEDERAL COURTS 256 (2d ed. 1970); see notes 19 through 21 *supra*.

[78] *See* AMERICAN BAR ASS'N SECTION OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION 70-76 (5th ed. 1971), *quoted and discussed in* AMERICAN JUDICATURE SOC'Y, *supra* note 17, at 10-11.

[79] C. WRIGHT, *supra* note 77, § 62, at 259; *see* Hanna v. Plumer, 380 U.S. 460 (1965).

[80] MISS. CONST. art. 6, §§ 144, 146.

[81] Joiner & Miller, *supra* note 24, at 626-30.

constitutional-theoretical reasons or based on practicality. The substantive category is said to be retained by the legislature. The two sectors overlap; indeed, they are indistinguishable,[82] except semantically.[83] Recognizing this, one authority concluded that no line should be attempted; instead, all power should reside in the courts.[84] The Mississippi experience has been an effectuation of the opposite view. Attempts to characterize the two purposes to divide them between the two branches have resulted in policy, not theory, determining placement of the line;[85] nearly every state draws the line differently, and the lines continue to shift.[86] Conflict between the two branches of government sometimes results.[87]

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[82] Chief Justice Marshall recognized this and left it to the legislature to make the distinction. Wayman v. Southard, 23 U.S. (10 Wheat.), 1, 42-43 (1825); *see* Iovino v. Waterson, 274 F.2d 41, 48 (2d Cir. 1959), *quoting* Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940) (" 'a twilight zone . . . where a rational classification could be made either way . . . .' "). *Compare* Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960) (doctor-patient privilege procedural since "a tribunal . . . must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented . . . ."), *with* Krizak v. W.C. Brooks & Sons, Inc., 320 F.2d 37, 42-43 (4th Cir. 1963), *and* Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 465-66 (2d Cir. 1962) (the doctor-patient privilege is a matter of substantive public policy).

Thus, even when characterization is attempted, point of view may lead to opposite results using the same test on the same facts. Consider B. CURRIE, SELECTED ESSAYS ON THE CONFLICTS OF LAWS 335-36 (1963):

> A statute of limitations may reasonably be interpreted as expressing two policies: one of protecting persons . . . from the risk of liability where lapse of time has rendered plaintiff's evidence unreliable . . . and one of protecting the courts against the difficulties of adjudication in such circumstances.

[83] Remarking that the Mississippi Supreme Court has traditionally made rules for its own internal functioning, and asked whether that was because such rules did not affect substantive rights of litigants, the Chief Justice replied, "Oh, no, the efficient administration of justice very substantially affects litigants' rights." Interview, *supra* note 37.

[84] Professor Wigmore, analyzing the constitutional grant of judicial power, concluded that legislation in the rulemaking area (evidence) was void. Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

[85] *E.g.*, Joiner & Miller, *supra* note 24, at 644-47. One area in which substantive-procedural characterization has received considerable attention is federal conflict of laws. The United States Supreme Court attempted to formulate a rule for drawing the line in Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941):

> The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.

This "rule," even though stated in terms of the problem and therefore seemingly innocuous, and while useful, still did not receive the unanimous approval of the Court. See Justice Frankfurter's dissent, arguing that much of substance would be characterized as procedural under the rule. *Cf.* Franck, *supra* note 5, at 303-04; Note, *supra* note 17, at 387-95.

[86] *See* AMERICAN JUDICATURE SOC'Y, *supra* note 17, at 18-21; AMERICAN JUDICATURE SOC'Y, *supra* note 22, at 6-7 (chart showing wide disparity among jurisdictions in their substance-procedure characterization of 25 bodies of regulation).

[87] The most recent study in the field concludes that such conflicts are "extremely rare." AMERICAN JUDICATURE SOC'Y, *supra* note 22, at 124. Nevertheless, the report notes

Since the Mississippi courts have now claimed the procedural portion of this power, and since the overlap lies in competing constitutional grants, the court, as arbiter of the constitution, will draw the line between substance and procedure. Under *Newell*, the court should decide whether the legislature, in enacting a rule, has acted within the court's conception of the extent of the legislature's constitutional grant.[88] It should not, however, substitute its judgment for the legislature's in all cases of potential conflict. The limited holding of *Newell* does not abolish the existing code of procedure, since the court made clear that it intended to stand by existing legislative rules until further examples of badly needed change came before it.[89] Leaving the legislative rules substantially undisturbed serves to minimize the potential both for conflicts and for being forced to draw lines between substance and procedure. As long as the bifurcation of the constitutional rulemaking power persists, however, a potential for conflict remains. The realization that the courts have the ultimate power to draw the substance-procedure line is a major step toward conflict avoidance. As a further step, many jurisdictions have established rulemaking commissions.[90] Several advantages accrue from use of commissions.[91] By unifying the rulemaking power in one commission convenience is served; the problem of possibly unconstitutional delegation of purely legislative power to the judiciary is avoided;[92] and the inconvenience of legislative rulemaking is also avoided.[93] A commission can include representatives of all branches of government, the bar, and lay sectors of society. A system of checks can be installed to ensure that neither the legisla-

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that conflicts have occurred in 17 of 49 responding jurisdictions (5 jurisdictions reported 3 or more conflicts) and "[i]n addition to the conflicts discussed above, other situations not appearing in any questionnaire response have come to our attention." *Id.* at 118, 123.

[88] Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its stautes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

THE FEDERALIST NO. 78, at 467-68 (New Am. Lib. ed. 1961) (A. Hamilton).

Hamilton notwithstanding, at least two authorities agree that specific legislative act should control, especially in its area of expertise. Joiner & Miller, *supra* note 24, at 641; Note, *supra* note 17, at 385. Neither, however, recognizes the judiciary's role as interpreter of the constitution as the paramount rulemaking power which, effectively, it is. *The Federalist* writers, however, saw the need for an arbiter of the constitution and reasoned that its interpretations would control over any statute. *See* THE FEDERALIST No. 78, *supra*, at 465-67; *id.* No. 81, at 482; *id.* No. 49, at 317 (J. Madison).

[89] 308 So. 2d at 76.

[90] *See* Sunderland, *Implementing the Rule-Making Power*, 25 N.Y.U.L. REV. 27 (1950).

[91] It has been argued that, due to difficulty of distinguishing between substance and procedure, the rulemaking power should not be fragmented. *See* Levin & Amsterdam, *Legislative Control Over Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 14-24 (1958) (legislature should keep plenary power).

[92] *Cf., e.g.*, Loftin v. George Co. Bd. of Educ., 183 So. 2d 621 (Miss. 1966); City of Meridian v. Davidson, 211 Miss. 683, 53 So. 2d 48 (1951); California Co. v. Oil & Gas Bd., 200 Miss. 824, 28 So. 2d 120 (1946).

[93] *See* text accompanying note 90 *supra*.

ture nor the judiciary is bypassed in the promulgation of rules. Of perhaps the greatest practical significance, a properly structured rulemaking commission will possess the resources which the judiciary lacks, the expertise and capability for continuing surveillance which the legislature lacks, and so will be equipped to promulgate initially an integrated, comprehensive system of rules and maintain that supervision of the system which flexibility requires.[94] In his concurrence in *Haralson v. State*, Chief Justice Gillespie wrote: "If a comprehensive effort is to be made to modernize the general procedural system it could more feasibly be accomplished with legislative cooperation."[95] The cooperation he was referring to, he said later,[96] was establishment of a rulemaking commission.

In apparent response to *Newell* and *Haralson*, the Mississippi legislature passed Senate Bill No. 2490[97] acknowledging the court's rulemaking power and establishing a commission to aid in promulgation of rules of civil procedure.[98] The commission is composed of 14 members, including 5 attorneys, 8 lower court judges, and 1 supreme court justice.[99] There is no provision for legislative or lay representation or for a recorder. The court appoints and staffs commission counsel. The commission is charged with maintaining surveillance of the civil practice, accepting input from all quarters, and recommending rules and changes to the court.[100] The court may then modify these recommendations and "promulgate" them. The rules are presented to the legislature, which has 60 days to act to disapprove them; if it fails to do so, the rule may still be vetoed by joint resolution of the judiciary committees of both houses en banc. The court may then submit amended rules, which undergo similar veto procedure. Senate Bill 2490 is assuredly a giant step in the right direction. The civil procedure commission it establishes unfortunately has neither legislative nor lay representation, detracting from desirably balanced input. This omission could also contribute

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[94] The Court owes an obligation to its first order of business, the litigants now before the Court and coming before the Court. The Court has neither facilities nor time to make any approach other than to correct a matter here and there. That will take many years to make any appreciable improvement.
Interview, *supra* note 37.

> Even the best system of rules cannot remain static. . . . It is essential, therefore, that there be a continuing body charged with the responsibility of examining the rules in action, and recommending change to the Court when this seems desirable.

C. WRIGHT, *supra* note 77, § 62, at 259 (footnote omitted).

[95] 308 So. 2d 222, 225 (Miss. 1975).

[96] Interview, *supra* note 37.

[97] An act to provide discovery procedures in civil proceedings in the chancery, circuit and county courts of this state; to implement the power of the Supreme Court to prescribe general rules of civil practice and procedure; to establish an advisory committee for the formulation of such rules; to provide how such rules shall be reported to the legislature . . . and for related purposes. Passed regular session 1975.

[98] Act of April 7, 1975, ch. 501, §§ 15-21, [1975] Gen. Laws Miss.

[99] *Id.* § 17.

[100] *Id.* § 19.

to perception of the commission as strictly an agency of the judiciary, prolonging needlessly the life of the procedural-substantive bifurcation.

In *Newell*, the court took a necessary step in asserting partial rulemaking power, but it also created the possibility of conflict with the legislature. The court can settle such conflicts by exercising its power as arbiter of the constitution; such a solution, although expedient, could result in unfortunate intragovernmental tension. The legislature, through Senate Bill 2490, has provided the basis for resolving the dilemma by establishing a rulemaking commission. By broadening the commission's representation and perceiving it as an expert advisory body, responsible to both legislature and judiciary,[101] Mississippi could have a body capable of promulgating and overseeing a comprehensive, flexible system of rules.

Martin C. McWilliams, Jr.

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[101] Since the commission has no powers and is only an advisory agency, there would be no conflict with MISS. CONST. art. 1, §§ 1, 7.

Mississippi Supreme Court Procedure—Three-Judge Divisions Do Not Violate Mississippi Constitution

Defendant moved that his case be submitted to the court en banc or to a quorum of the full court instead of a division of three justices as required by rule 35 of the Mississippi Supreme Court Rules.[1] Defendant contended that Mississippi Constitution article 6, section 145B, providing for nine justices and explicitly requiring five justices to constitute a quorum, by implication repealed article 6, section 149A, which authorizes the court to review cases in two divisions of three justices each. *Held*, motion denied. The word "two" in section 149A is surplusage, and that section confers jurisdiction upon the Mississippi Supreme Court to review cases in three-judge divisions; therefore, section 145B and section 149A are *in pari materia* and should be construed in harmony to provide the court with a choice of convening the full court or a three-judge division. *Russell v. State*, 312 So. 2d 422 (Miss. 1975).

Prior to 1916, section 145 of the Mississippi Constitution[2] provided that the supreme court would consist of three justices, any two of whom when convened would constitute a quorum. In 1916, section 145A[3] amended section 145 to allow for three additional justices; any four of the six justices constituting a quorum. Section 149A, added the same year, granted the court the power to choose to sit as a full court or in two divisions of three justices each.[4] Under this section, if the court chose to sit in divisions of three justices, any two justices of the division would constitute a quorum. In 1935[5] the court stated that the concluding words of section 149A, "the cause shall then be considered and adjudged by the full Court or a quorum thereof," meant only that the full court could function with a majority of justices present, and that the words in no way affected the court's discretion to hear a case en banc or in a division.[6] *Tillman v. Massa*[7] explicitly stated that section 149A of the constitution delegated the power to the court, not the legislature, to decide which cases would be heard en banc, and

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[1] Rule 35 authorizes the court to sit in divisions of three judges each, with each division having full power to hear and adjudge all cases assigned to it. Miss. Sup. Ct. R. 35, *as amended*, July 25, 1974.

[2] Miss. Const. art. 6, § 145.

[3] *Id.* § 145A.

[4] The Supreme Court shall have power, *under such rules and regulations as it may adopt*, to sit in *two* divisions of three judges each, any two of whom *when convened* shall form a quorum; each division shall have full power to hear and adjudge all cases that may be assigned to it by the court. In event the judges composing any division shall differ as to the judgment to be rendered in any cause, or in event any judge of either division, within a time and in a manner to be fixed by the rules to be adopted by the court, shall certify that in his opinion any decision of any division of the court is in conflict with any prior decision of the court or of any division thereof, the cause shall then be considered and adjudged by the *full court* or a *quorum* thereof.

Id. § 149A (emphasis added).

[5] Dean v. State, 173 Miss. 254, 162 So. 155 (1935).

[6] *Id.* at 312, 162 So. at 158. At this time four justices constituted a majority.

[7] 177 Miss. 170, 170 So. 641 (1936).

which cases would be heard before a three-judge division.[8] The only condition precedent to convening a three-judge panel was that the litigants receive notice as to what division would hear their case.[9] An early challenge to quorum decisions contended that under section 145A all members of a quorum of the court must vote affirmatively to reverse a decision of the lower court.[10] The court rejected this contention, stating that a majority of the quorum could decide any issue.[11] The court subsequently announced that the commonly recognized interpretation of quorum was "[s]uch a number of a body as is competent to transact business in the absence of the other members."[12] Two cases[13] challenged decisions of divisions on the ground that they were not final decisions for the purpose of appeal to the United States Supreme Court and, therefore, hearings before the entire court were requested.[14] The court answered that any decision rendered by a division was to be considered the final decision of the court[15] unless any justice of the court certified that in his opinion the decision was against precedent. In that event, the case would be heard before the full court.[16] In 1952[17] section 145B,[18] providing for three additional justices, was added to the constitution, resulting in a total of nine justices, any five of whom would constitute a quorum. The court shortly thereafter chose to sit in panels of five justices "[f]or the convenient dispatch of business."[19] Soon the validity of five-judge panels was challenged contending that when a suggestion of error was raised by

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[8] *Id.* at 171, 170 So. at 641. *See* Hudson v. Gulf Refining Co., 202 Miss. 331, 351-52, 30 So. 2d 421, 422-23 (1947); Jefferson Standard Life Ins. Co. v. Ham, 178 Miss. 838, 852, 173 So. 672, 673 (1937).

[9] Hudson v. Gulf Refining Co., 202 Miss. 331, 351-52, 30 So. 2d 421, 422-23 (1947).

[10] Dean v. State, 203 Miss. 254, 312, 162 So. 155, 158 (1935).

[11] *Id.* at 312, 162 So. at 157-58. *See* Shedd v. State, 203 Miss. 544, 551, 33 So. 2d 816, 818 (1948); Slush v. Patterson, 201 Miss. 113, 132, 29 So. 2d 311, 312 (1947).

[12] Slush v. Patterson, 201 Miss. 113, 131-32, 29 So. 2d 311 (1947).

[13] Carney v. Anderson, 214 Miss. 504, 59 So. 2d 262 (1952) (decisions of five-judge divisions); Hays Finance Co. v. Bailey, 56 So. 2d 806 (Miss.), *appeal dismissed*, 343 U.S. 959 (1952) (decisions of three-judge divisions).

[14] The court stated in *Hays* that it was immaterial that the legislature had added three new judges since the original hearing of this case, indicating the same results would have been reached by the court. Hays Finance Co. v. Bailey, 56 So. 2d 806, 807 (Miss.), *appeal dismissed*, 343 U.S. 959 (1952).

[15] Carney v. Anderson, 214 Miss. 504, 518, 59 So. 2d 262 (1952); Hays Finance Co. v. Bailey, 56 So. 2d 806, 807 (Miss.), *appeal dismissed*, 343 U.S. 959 (1952).

[16] Carney v. Anderson, 214 Miss. 504, 518, 59 So. 2d 262 (1952); Hays Finance Co. v. Bailey, 56 So. 2d 806, 807 (Miss.), *appeal dismissed*, 343 U.S. 959 (1952). For further reference, see MISS. CONST. art. 6, §149A, and MISS. SUP. CT. R. 35(e), before amendment of July 25, 1974.

[17] *See* Resolution of Jan. 9, 1952, ch. 468, [1952] Gen. Laws Miss. 755.

[18] MISS. CONST. art. 6, § 145B states:

> The Supreme Court shall consist of nine judges, that is to say, of three judges in addition to the six provided for by section 145A of this Constitution, any five of whom when convened shall constitute a quorum. The additional judges herein provided for shall be selected one for and from each of the supreme court districts in the manner provided by section 145A of this Constitution or any amendment thereto.

[19] MISS. SUP. CT. R. 35(b), before amendment of July 25, 1974.

motion, a full court should be called to determine the case.[20] The court declared that when all five justices on the panel agreed on a decision,[21] it was a final decision; to adopt any other view would lead to every case being heard before the full court.[22] Generally, statutes dealing with jurisdiction are liberally construed.[23] The practice of the Mississippi court is to construe statutes so the intent and purpose of the legislature will be realized.[24] Pursuant to this policy, legislation is often given a presumption of validity.[25] Where two interpretations are available to the court, one of which will cause the statute to be declared unconstitutional, the interpretation that will uphold the statute is adopted.[26] Where statutes are clear and unambiguous, the Mississippi Supreme Court has stated that they should be left to their plain meanings.[27] These apparently simple words, however, have been reduced to a catchphrase by the court. Once it has determined that the legislative purpose of an act is not being fulfilled,[28]

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[20] Ryan Supply Co. v. Brett, 222 Miss. 30, 75 So. 2d 721 (1954).

[21] *Compare* Ryan Supply Co. v. Brett, 222 Miss. 30, 36-37, 75 So. 2d 721 (1954) (requiring a unanimous decision of the quorum of the court when meeting in divisions of five justices), *with* Dean v. State, 203 Miss. 254, 309, 162 So. 155, 157 (1935) (requiring only a majority of the quorum when meeting with the full court).

[22] Ryan Supply Co. v. Brett, 222 Miss. 30, 36-37, 75 So. 2d 721 (1954) (the court noted it was their procedure to sit in two groups).

[23] 3 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 67.03 (4th ed. C. Sands ed. 1974). *See* Walters v. Walters, 180 Miss. 268, 275-76, 177 So. 507, 508 (1937).

[24] *See, e.g.*, Aikerson v. State, 274 So. 2d 124, 127 (Miss. 1973); Akers v. Estate of Johnson, 236 So. 2d 437, 439 (Miss. 1970); Black-Acres Country Club, Inc. v. Mississippi State Tax Comm'n, 216 So. 2d 531, 534 (Miss. 1968); State *ex rel.* Patterson v. Board of Supervisors, 233 Miss. 240, 271-72, 102 So. 2d 198, 210 (1958); State v. Necaise, 228 Miss. 542, 548, 87 So. 2d 922, 925 (1956); McCullen v. Alexander, 217 Miss. 256, 267-68, 63 So. 2d 856, 861 (1953); Thornhill v. Ford, 213 Miss. 49, 65, 56 So. 2d 23, 30 (1952); Trahan v. State Highway Comm'n, 169 Miss. 732, 747, 151 So. 178, 182 (1933); Moore v. General Motors Acceptance Corp., 155 Miss. 818, 823-24, 125 So. 411, 412 (1930).

[25] *See* Lipman v. Van Zant, 329 F. Supp. 391, 401 (N.D. Miss. 1971) (the cardinal principle of statutory construction is to save and not destroy); Schaeffer v. Sharp, 328 F. Supp. 762, 766 n.7 (S.D. Miss. 1971); Aikerson v. State, 274 So. 2d 124, 127 (Miss. 1973).

[26] State v. Louisville & N.R.R., 97 Miss. 35, 60, 53 So. 454, 455 (1910); Beck v. Allen, 58 Miss. 143, 162 (1880); Virden v. Bowers, 55 Miss. 1, 18 (1877); Burnham v. Sumner, 50 Miss. 517, 520 (1874). *See* Aikerson v. State, 274 So. 2d 124, 127 (Miss. 1973) (will not impute unwise construction to statute where a reasonable construction can be found); Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 510, 62 So. 2d 772, 774 (1953); L. H. Conard Furniture Co. v. Mississippi State Tax Comm'n, 160 Miss. 185, 197, 133 So. 652, 656 (1931) (need to determine if construction of act is good or bad).

[27] *See, e.g.*, Entrican v. King, 289 So. 2d 913, 917 (Miss. 1974) (court cannot add personal liability by amendment where the legislature has not imposed such a liability); First Nat'l Bank v. Canton Exch. Bank, 247 Miss. 757, 765, 156 So. 2d 580, 583 (1963) (where language is plain and unambiguous it obviously must be construed to mean what it says); Day v. Hart, 232 Miss. 516, 523, 99 So. 2d 656, 660 (1958); Texas Co. v. Wheeless, 185 Miss. 799, 823, 187 So. 880, 888 (1939); George v. Woods, 94 Miss. 268, 277, 49 So. 147, 148 (1909); Peeler v. Peeler, 68 Miss. 141, 147, 8 So. 392, 393 (1890).

[28] Aikerson v. State, 274 So. 2d 124, 127 (Miss. 1973); State v. Necaise, 228 Miss. 542, 548, 87 So. 2d 922, 925 (1956); McCullen v. Alexander, 217 Miss. 256, 267-68, 63 So. 2d

the court has expanded the "plain meaning" of a statute by adding words,[29] using liberal rather than literal interpretations,[30] and manipulating punctuation.[31] One method used by the court to determine legislative intent is to study an act in its historical context.[32] In interpreting constitutional provisions, however, the court has refused to be limited by historical considerations. In *Stepp v. State*,[33] the court stated:

> It is a mistake to suppose that a constitution is to be interpreted only in the light of things as they existed at the time of its adoption. On the contrary, a constitution is intended to endure for a long time, *and is interpreted in the light of developments which have appeared at the time of the interpretation*, and may therefore include *things* and

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856, 861 (1953); Thornhill v. Ford, 213 Miss. 49, 65, 56 So. 2d 23, 30 (1952); Texas Co. v. Wheeless, 185 Miss. 799, 823, 187 So. 880, 888 (1939); Mississippi Cottonseed Prods. Co. v. Stone, 184 Miss. 407, 421, 184 So. 428, 431 (1938); Gandy v. Public Serv. Corp., 163 Miss. 187, 197, 140 So. 687, 689 (1932); Roseberry v. Norsworthy, 135 Miss. 845, 857, 100 So. 514, 516 (1924); Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 812, 46 So. 819, 823 (1908); Earhart v. State, 67 Miss. 325, 327, 7 So. 347 (1890); Peeler v. Peeler, 68 Miss. 141, 147, 8 So. 392, 393 (1890).

[29] *E.g.*, Mississippi Cottonseed Prods. Co. v. Stone, 184 Miss. 409, 421-22, 184 So. 428, 431 (1939) ("In construing a statute a court may ascertain its true meaning by studying it as a whole; and when ascertained, may enforce it, even to the extent of correcting errors in the language used."); Gandy v. Public Serv. Corp., 163 Miss. 187, 197, 140 So. 687, 689 (1932); Roseberry v. Norsworthy, 135 Miss. 845, 857, 100 So. 514, 516 (1924) (deemed the error in the statute a clerical mistake); Bobo v. Board of Levee Comm'rs, 92 Miss. 792, 811, 46 So. 819, 822-23 (1908) (clerical mistake); Earhart v. State, 67 Miss. 325, 327, 7 So. 347 (1890) (clerical mistake); Ellis v. Murray, 28 Miss. 129, 143 (1854) (clerical omission).

[30] State v. Necaise, 228 Miss. 542, 548, 87 So. 2d 922, 925 (1956); McCullen v. State *ex rel.* Alexander, 217 Miss. 256, 274, 63 So. 2d 856, 862-63 (1953); Thornhill v. Ford, 213 Miss. 49, 65, 56 So. 2d 23, 30 (1952) (to carry out the legislative intent the court may go wider or narrower than the mere letter of the enactment); Texas Co. v. Wheeless, 185 Miss. 799, 811, 187 So. 880, 883 (1939); State v. Ware, 102 Miss. 634, 638, 59 So. 854, 855 (1912).

[31] Aikerson v. State, 274 So. 2d 124, 127 (Miss. 1973). The kidnapping statute, MISS. CODE ANN. § 97-3-53 (Supp. 1974), without the punctuation read into it by the court, would permit imposition of the death penalty for *any* unlawful, forcible seizure of a person.

[32] *See, e.g.*, Akers v. Estate of Johnson, 236 So. 2d 437, 439 (Miss. 1970); Black-Acres Country Club, Inc. v. Mississippi State Tax Comm'n, 216 So. 2d 531, 534 (Miss. 1968); State *ex rel.* Patterson v. Board of Supervisors, 233 Miss. 240, 271-72, 102 So. 2d 198, 210 (1958). In Hart v. Backstrom, 148 Miss. 13, 113 So. 898 (1927), the court set forth this guideline for interpretation:

> In construing constitutional provisions, the courts should look to the history of the times and examine the state of things in existence when the constitutional provision in question was adopted, in order to ascertain the mischief sought to be remedied. In other words, the courts should look to the historical facts surrounding the adoption of the constitutional provision in question. Prior well-known practices and usages should be considered.

Id. at 33, 113 So. at 901 (footnotes omitted).

[33] 202 Miss. 725, 32 So. 2d 447 (1947).

> *conditions* which not only *did not exist* but were *not contemplated* when it was drafted, so long as the new developments are in their nature within the scope of the purposes and powers for the furtherance of which the constitution was established.[34]

The Mississippi Constitution section relating to amendment of laws specifically provides that no law shall be amended by reference to its title only, but must be reproduced completely.[35] There are two notable exceptions: amendments by implication[36] and repeal by implication.[37] Neither amendment by implication[38]

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[34] *Id.* at 729, 32 So. 2d at 447 (emphasis added). *Accord*, W. Horace Williams Co. v. Federal Credit Co., 198 Miss. 111, 119, 21 So. 2d 582, 583 (1945) ("The court will look to the dominant object to be accomplished by the constitutional provisions rather than to a literal or technical interpretation."); Dunn v. Love, 172 Miss. 342, 354-55, 155 So. 331, 333 (1934)(constitution is not "sculptured idol" with "changeless features"); Moore v. General Motors Acceptance Corp., 155 Miss. 818, 822, 125 So. 411, 413 (1930) (if constitution is not allowed to accomodate change, such restriction will lead to its ultimate destruction).

[35] Miss. Const. art. 4, § 61. Miss. Const. art. 4, § 71 provides that each bill shall have a title which ought to indicate clearly the subject matter of the legislation. The title, however, cannot be relied on to imply the full purpose of the act. First Nat'l Bank v. Canton Exch. Bank, 247 Miss. 757, 764, 156 So. 2d 580, 583 (1963). When a title to an act specifies the proposed sections to be amended, it is unconstitutional for the body of the act to deal with any sections but those named in the title. Board of Levee Comm'rs v. Royal Ins. Co., 96 Miss. 832, 835, 51 So. 2 (1910).

[36] McCaskill v. State, 227 So. 2d 847, 850-51 (Miss. 1969)(statutes which amend other statutes by implication are not within the application of section 61 of the Mississippi Constitution); Hall v. State, 166 Miss. 331, 337, 148 So. 793, 794 (1933); Hart v. Backstrom, 148 Miss. 13, 34, 113 So. 898, 901 (1927); Buford v. State, 146 Miss. 66, 82, 111 So. 850, 853 (1927); Stingily v. City of Jackson, 140 Miss. 19, 43, 104 So. 465, 466 (1925); Mayor of Jackson v. State *ex rel.* Howie, 102 Miss. 663, 688, 59 So. 873, 875 (1912) (acts which merely supplement other acts are not precluded under Miss. Const. § 61).

"An implied amendment is an act which purports to be independent of, but which in substance alters, modifies, or adds to a prior act." Belk v. Bean, 247 So. 2d 821, 826 (Miss. 1971) (footnote omitted).

[37] Jackson Municipal Airport Authority v. Shivers, 206 So. 2d 190 (Miss. 1968):

> [T]he doctrine of repeal by implication is not favored in law, but when there is an irreconcilable conflict between two statutes, the latter statute repeals the former insofar as it is in conflict.

Id. at 193; *accord*, United States Fidelity & Guar. Co. v. Higdon, 235 Miss. 385, 396-97, 109 So. 2d 329, 334 (1959); State *ex rel.* Collins v. Jackson, 119 Miss. 727, 739-41, 81 So. 1, 5 (1919).

> A repeal by implication takes place when
> a later act covers the whole subject of earlier acts, and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject matter, even if the former acts are not in all respects repugnant to the new act.

Jackson Municipal Airport Authority v. Shivers, 206 So. 2d 190, 194 (Miss. 1968), *citing* Asher & Baxter v. Moyse & Co., 101 Miss. 36, 57 So. 299 (1911) (emphasis deleted).

[38] Belk v. Bean, 247 So. 2d 821, 827 (Miss. 1971) (it must be manifestly clear that an

nor repeal by implication[39] is favored by our courts. While amendment and repeal by implication are strictly construed,[40] where special and general statutes conflict, the special statute generally will prevail.[41] When legislation is passed, it is assumed that the legislature had a reasonable purpose[42] in enacting it and did so with the knowledge that there were other related statutes dealing with the same proposition.[43] In accord with this latter presumption, the court has attempted to harmonize conflicting sections[44] and statutes[45] whenever possible. When dealing with statutes deemed *in pari materia*,[46] this effort to harmonize has been especially pronounced.[47] The court recently adopted a rule allowing it

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amendment is intended); United States Fidelity & Guar. Co. v. Higdon, 235 Miss. 385, 396-97, 109 So. 2d 329, 334 (1959) (courts sometimes mix the terms amendment by implication and repeal by implication).

[39] Bush v. City of Laurel, 215 So. 2d 256, 259 (Miss. 1968); Jackson Municipal Airport Authority v. Shivers, 206 So. 2d 190, 193 (Miss. 1968); State v. Hall, 187 So. 2d 861, 863 (Miss.), *appeal dismissed*, 385 U.S. 98 (1966). (constitution provisions of longstanding should be changed by legislative amendments only); United States Fidelity & Guar. Co. v. Higdon, 235 Miss. 385, 396-97, 109 So. 2d 329, 334 (1959); McCullen v. State *ex rel.* Alexander, 217 Miss. 256, 267-68, 63 So. 2d 856, 859 (1953); Dunn Constr. Co. v. Craig, 191 Miss. 682, 701, 2 So. 2d 166, 170 (1941); Gully v. Lumbermen's Mut. Cas. Co., 176 Miss. 388, 397, 166 So. 541, 542 (1936); State *ex rel.* Collins v. Jackson, 119 Miss. 727, 739, 81 So. 1, 5 (1919). Where there are special words and general words found within the same statute, the special words usually control. Leinkauf v. Barnes, 66 Miss. 207, 213, 5 So. 402, 404 (1889).

[40] *See, e.g.*, Belk v. Bean, 247 So. 2d 821, 827 (Miss. 1971); Jackson Municipal Airport Authority v. Shivers, 206 So. 2d 190, 193-94 (Miss. 1968).

[41] McCullen v. State *ex rel.* Alexander, 217 Miss. 256, 267-68, 63 So. 2d 856, 859 (1953) (special statute acts as qualification on general statute); Dunn Constr. Co. v. Craig, 191 Miss. 682, 701, 2 So. 2d 166, 170 (1941); Gully v. Lumbermen's Mut. Cas. Co., 176 Miss. 388, 397, 166 So. 541, 542 (1936).

[42] Entrican v. King, 289 So. 2d 913, 917 (Miss. 1974).

[43] *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.02 (4th ed. C. Sands ed. 1973). *Cf.* cases cited in note 39 *supra*.

[44] United States Fidelity & Guar. Co. v. Higdon, 235 Miss. 385, 397, 109 So. 2d 329, 334 (1959); State *ex rel.* Patterson v. Board of Supervisors, 233 Miss. 240, 271-72, 102 So. 2d 198, 210 (1958); Wilson v. Yazoo & M.V.R.R., 192 Miss. 424, 429, 6 So. 2d 313, 314 (1942).

[45] Belk v. Bean, 247 So. 2d 821, 827 (Miss. 1971); Jackson Municipal Airport Authority v. Shivers, 206 So. 2d 190, 193 (Miss. 1968); McCullen v. State *ex rel.* Alexander, 217 Miss. 256, 267-68, 63 So. 2d 856, 859 (1953); State *ex rel.* Collins v. Jackson, 119 Miss. 727, 736-37, 81 So. 1, 5 (1919).

[46] *In pari materia* statutes are statutes dealing with the same subject matter. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.01 (4th ed. C. Sands ed. 1973).

[47] Hyde Constr. Co. v. Koehring Co., 321 F. Supp. 1193, 1203 (S.D. Miss. 1969); King v. Cook, 297 F. Supp. 99, 103 (N.D. Miss. 1969); Monroe Banking & Trust Co. v. Allen, 286 F. Supp. 201, 207 (N.D. Miss. 1968); Reed v. State, 199 So. 2d 803, 806 (Miss. 1967); McCullen v. State *ex rel.* Alexander, 217 Miss. 256, 267-68, 63 So. 2d 856, 859 (1953); Yazoo & M.V.R.R. v. Claiborne County, 191 Miss. 277, 285, 2 So. 2d 548, 550 (1941); St. Louis & S.F. Ry. v. Benton County, 132 Miss. 325, 330, 96 So. 689, 690 (1923). The Mississippi Supreme Court has even held that our workmen's compensation laws and our marriage laws should be construed together because "each is an important part of the

to hear cases in panels of three justices each.[48] The court has followed precedent[49] in holding that whenever a judge sitting on a panel disagrees with the rest of the panel,[50] or certifies that in his opinion the decision conflicts with precedent,[51] or determines that the case is unusually important,[52] the case shall be heard before the full court.[53] Further, the court only hands down a written opinion after all the justices on the court have either concurred or dissented, and all petitions for rehearing are voted on by the full court.[54]

In the instant case the majority reasoned that since section 149A conferred jurisdiction upon three-judge divisions of the supreme court and since at the time of its passage only two divisions were possible, the word "two" in that section is surplusage and does not prevent the court from holding three divisions of three justices each. The court then concluded that since both section 145B and section 149A confer jurisdiction upon the court, and since these sections are not in irreconcilable conflict and deal with the same subject matter, they should be harmonized to give effect to both and to allow the court the choice of convening a three-judge division or the full court.

In a lengthy dissent, Presiding Justice Rodgers concluded that since section 149A applied specifically to a court consisting of six justices and provided for only two divisions, it could not be applied to a court made up of nine justices, as required by section 145B. Justice Rodgers reasoned that since section 145B calls for a total of nine justices and a quorum of five justices, the section is irreconcilable with section 149A and should repeal section 149A by implication, section 145B being the latest expression of the legislature. The presiding justice in addition concluded that since five justices were required for a quorum by the constitution, any lesser number reviewing a case would amount to a denial of due process. Based upon his experience, Justice Rodgers also felt that due to the diverse educations of the justices, five justices are more likely to render a proper decision than three.

The majority in the instant decision concluded in a well-reasoned and concise opinion that the Mississippi Supreme Court does have the jurisdiction to review cases in three-judge divisions.[55] In rendering this decision, however, the court did not rely upon the many Mississippi cases dealing with statutory construction. Perhaps the court felt their decision was obvious enough so as not to require citations to these precedents. Practically speaking, however, it would be

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whole law of the state." South Cent. Heating & Plumbing Co. v. Dependants of Campbell, 219 So. 2d 140, 142 (Miss. 1969).

[48] MISS. SUP. CT. R. 35(a), *as amended*, July 25, 1974.

[49] Carney v. Anderson, 214 Miss. 504, 518, 59 So. 2d 262 (1952); Hays Finance Co. v. Bailey, 56 So. 2d 806 (Miss. 1952).

[50] Russell v. State, 312 So. 2d 422, 423 (Miss. 1975).

[51] *Id.* at 424.

[52] *Id.* at 425.

[53] *Compare* MISS. SUP. CT. R. 35(e), *as amended*, July 25, 1974, *with* FED. R. APP. P. 35A. Under the federal appellate procedure it takes a majority vote of the active judges on the United States Courts of Appeals to convene a hearing en banc.

[54] Russell v. State, 312 So. 2d 422, 425 (Miss. 1975).

[55] *Id.*

much easier for attorneys in Mississippi to follow the progressive arguments of the court if the bases of their decisions were cited. Both the majority[56] and dissent[57] chose to emphasize the word "quorum" in reaching their decisions. Perhaps more emphasis should have been placed on the phrase "when convened."[58] This phrase seems to be the logical basis for the right of the court to choose to sit in three-judge divisions or a full court. It would seem that a "quorum" would be a condition subsequent, since it is necessary to determine whether there are a sufficient number of justices present to conduct the business of the court only after the court has convened. In order to convey the dissent's interpretation of section 145B, the section would have to read "in order to convene the court it is necessary that a quorum of the full court be present." Surely, if the court in the past had no trouble in sustaining a full-court quorum of four and division quorums of two, there should be no difficulty in upholding a full-court quorum of five and division quorums of two.

The United States Courts of Appeals currently sit in three-judge panels unless a majority of the active judges vote to sit en banc on a particular case.[59] Thus, the Mississippi Supreme Court by its order issued July 25, 1974,[60] has a much more liberal view of en banc hearings, since it takes only one justice to require an en banc proceeding. While a hearing before a three-judge division may not be as desirable as a hearing before the full court, it does have the advantage of expediting matters. The court should now be able to handle many more cases than when they were meeting in only two panels. This action by the court should defer the need for an intermediary appellate court. There is really very little difference between the new procedure adopted by the court and institution of an intermediary court. Possibly the only advantage the present system has over an intermediary court is that it takes only one justice to attain review by the full court, whereas the court would probably have to vote on review of a case coming from an intermediary court.

The court, in adopting this view of its jurisdiction, has clearly stated its intentions. If the legislature believes that supreme court review should be handled in a different manner, then it must take affirmative action and pass an appropriate amendment. Until such action is taken challenging the three-judge divisions, it can be assumed that the legislature agrees with the court and approves its procedure.

Charles Edward Sorey II

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[56] *Id.*

[57] *Id.* at 426.

[58] This phrase is found in MISS. CONST. art. 6, §§ 145B, 149A.

[59] FED. R. APP. P. 35A.

[60] MISS. SUP. CT. R. 35 (e), *as amended*, July 25, 1974.

TORTS—IMPACT RULE—RECOVERY ALLOWED FOR MENTAL DISTRESS ABSENT BOTH IMPACT AND FEAR OF IMPACT

In a tort action, plaintiff sought damages[1] from the defendant bank for injuries caused by the bank's delay in retrieving store receipts which had been deposited by plaintiff in the bank's night depository and which had become trapped in the depository mechanism.[2] Despite persistent efforts by plaintiff to persuade bank officials that the missing deposit was trapped in the the mechanism, only two superficial attempts to find it were made during the following 3 weeks. Subsequently, the manufacturer of the night depository mechanism was notified of the missing money, and its employees dismantled the mechanism in approximately 20 minutes, finding the deposit trapped inside. Plaintiff alleged that while the money was missing he suffered mental distress and resulting physical injuries which required psychiatric care and emergency medical treatment.[3] Rejecting defendant's argument that physical injuries which result from negligently inflicted mental distress must have flowed from some impact on the body of the plaintiff, the trial court refused defendant's motion for a directed verdict and entered judgment for the plaintiff in accordance with the jury's verdict.[4] On appeal to the Mississippi Supreme Court, *held*, affirmed. A defendant whose negligence creates a foreseeable risk of mental distress can be held liable for genuine injuries which result from such distress even though his negligence produced neither contemporaneous impact on the body of the plaintiff nor fear of such impact. *First National Bank v. Langley*, 314 So. 2d 324 (Miss. 1975).

The law regarding the degree of protection afforded plaintiffs seeking damages for mental distress and its physical consequences has been characterized by a gradual weakening of arbitrary barriers to recovery.[5] The early decisions allowed damages for mental distress and its consequences only if awarded as "parasitic" damages made in addition to an award on an independent cause of action.[6] The impact rule was an outgrowth of this judicial reluctance to recog-

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[1] The plaintiff also sought punitive damages which were denied by the courts at both the trial and appellate levels. This aspect of the case is substantially irrelevant to the implications of the court's holding, and, therefore, will only be peripherally discussed. See note 61 *infra*.

[2] The plaintiff was the manager of a retail store owned by the Great Atlantic & Pacific Tea Company (A & P). One of his managerial duties, customarily accomplished after closing on Saturdays, was to make separate deposits of morning and afternoon receipts to the account carried by A & P with the First National Bank. First Nat'l Bank v. Langley, 314 So. 2d 324, 326 (Miss. 1975).

[3] The evidence showed that the plaintiff suffered from anxiety neurosis, depression which resulted in overbreathing, muscular tension, shaking, excessive sweating, and acute response to noise. It was also shown that he experienced severe swelling of the tongue and lips which seriously interfered with his respiratory processes and as a result necessitated occasional emergency hospital care. *Id.* at 328.

[4] The award totaled $5,339. *Id.*

[5] *Compare* Annot., 11 A.L.R. 1119 (1921), *with* Annot., 64 A.L.R.2d 100 (1959), *and* Annot., 29 A.L.R.3d 1337 (1970).

[6] Lord Wensleydale indicated the basis for this early view when he remarked, "Mental pain or anxiety the law cannot value and does not pretend to redress, when the

nize mental distress as an independent basis for awarding damages.[7] The rule—which requires physical impact upon the plaintiff's person as a prerequisite to recovery for negligently[8] inflicted mental distress or consequent physical injuries[9]—originated in England in *Victorian Railway Commissioners v. Coultas*.[10] In *Coultas*, the Privy Council held that there could be no recovery for physical injuries resulting from negligently inflicted fright and nervous shock. The Council rested its holding on the following conclusions: physical injury is not an ordinary consequence of fright, thus the damage was too remote; allowing recovery would lead to increased litigation; problems of proof would engender ficticious claims; and no precedent for allowing recovery in such an action existed.[11] Even though *Coultas* is a questionable precedent for requiring impact,[12] the American jurisdictions which adopted the rule substantially accepted and restated the bases for nonliability expressed by the Privy Council.[13] The leading American case, *Mitchell v. Rochester Railway*,[14] reflected the early judicial skepticism toward the adequacy of medical evidence in establishing the genuineness of the alleged injuries.[15] The *Mitchell* court found that allowing recovery

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unlawful act complained of causes that alone." Lynch v. Knight, 11 Eng. Rep. 854, 863 (H.L. 1861).

[7] *See* W. PROSSER, THE LAW OF TORTS § 54 (4th ed. 1971) [hereinafter cited as PROSSER]; Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

[8] The courts have been more receptive to allowing recovery in the absence of impact or resulting physical injury where mental distress has been intentionally or willfully and wantonly inflicted. Although the recognition of the right to recover in these situations is significant, a full analysis is beyond the scope of this note. *See* PROSSER, *supra* note 7, § 12; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

[9] *See, e.g.*, Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *See also* Note, *The Right to Mental Security*, 16 U. FLA. L. REV. 540 (1964).

[10] [1888] 13 A.C. 222 (P.C.) (Victoria). The defendant's gatekeeper had negligently allowed the buggy in which the plaintiff was riding to come dangerously close to colliding with a train. The plaintiff alleged that she suffered impaired health, memory, and eyesight as a result of fright.

[11] *Id.* at 225-26. The decision rested primarily upon the remoteness of the injury rather than the absence of impact:

> They are of [the] opinion that . . . whether the damages are too remote, should have been answered in the affirmative, and on that ground, *without saying that "impact" is necessary*, that the judgment should have been for defendants.

Id. at 226 (emphasis added).

[12] Dulieu v. White & Sons, [1901] 2 K.B. 669.

[13] *E.g.*, Massachusetts—Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897); New York—Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896). *See also* Throckmorton, *supra* note 7.

[14] 151 N.Y. 107, 45 N.E. 354 (1896). "[N]o recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury." 45 N.E. at 355. The court was of the opinion that since there could be no recovery for mental distress alone there could be no recovery for resulting physical consequences.

[15] *See* Smith, *Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193, 208 (1944).

would open the door to a flood of litigation, would allow ficticious and speculative claims, and would lead to recovery for injuries which were not ordinary and natural results of the original negligent act.[16] The impact rule became the majority rule in the United States by 1930.[17] Significantly, the reasons advanced in support of invoking the impact rule have been substantially discredited.[18] Jurisdictions which adopted the rule feared uncontrollable litigation[19] since, without actual physical impact, there was no guarantee that alleged injuries were genuine.[20] Thus, the impact rule is essentially an expression of administrative policy.[21] Some of the early decisions,[22] however, refused to accept the rationale for the rule where recovery was sought for mental distress and resulting physical injuries.[23] These decisions provided precedent for the rule's eventual rejection

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[16] Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354, 354-55 (1896).

[17] 42 U. Mo. K.C.L. Rev. 234 (1973).

[18] All these objections have been demolished many times, and it is threshing old straw to deal with them. Mental suffering is no more difficult to estimate in financial terms, and no less a real injury than "physical" pain; it is not an independent intervening cause, but a thing brought about by the defendant's negligence itself, and its consequences follow in unbroken sequence from that negligence; and while it may be true that its consequences are seldom very serious unless there is some predisposing physical condition, the law is not for the protection of the physically sound alone. It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied, and by this time there is precedent enough, and no such increase in litigation is to be observed.

Prosser, *supra* note 7, § 54, at 327-28 (footnotes omitted); *cf.* Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916). *See also* Goodrich, *Emotional Disturbance as Legal Damage*, 20 Mich. L. Rev. 497 (1922).

[19] *E.g.*, Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897) (recovery denied for administrative reasons). The flood-of-litigation argument which was the basis for such policy determinations has been criticized by some courts which have rejected the impact rule. *E.g.*, Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970). *See also* Labert, *Tort Liability for Psychic Injuries*, 41 B.U.L. Rev. 588 (1964).

[20] Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941). Using impact as a guarantee of genuineness, largely due to a significant lack of medical knowledge relating to mental injury and its consequences, enabled the early courts to avoid causation problems when negligently inflicted mental distress intervened between the defendant's negligent act and the plaintiff's resulting injury. *See* Smith, *supra* note 15, at 193-207.

[21] *See* Smith, *supra* note 15.

[22] *E.g.*, Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 P. 320 (1896); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1890); Memphis St. Ry. v. Bernstein, 137 Tenn. 637, 194 S.W. 902 (1917).

[23] It is in the context of claims alleging resulting physical injury that the impact rule has been applied to deny recovery, and the present majority rule denies recovery for negligently inflicted mental distress unaccompanied by objectively observable physical injuries. A few jurisdictions, however, have allowed recovery for negligently inflicted mental distress without resulting injury in two limited fact situations: the negligent transmission of a message and the negligent mishandling of dead bodies. *E.g.*, Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930); Renihan v. Wright, 125 Ind. 536, 25 N.E.

in the majority of American jurisdictions.[24] The opinions were based upon the belief that resulting physical injury constituted a sufficient guarantee the alleged injuries were genuine.[25] Where a plaintiff demonstrated that physical injury was the natural and direct result of negligently inflicted mental distress, recovery would be allowed; once the defendant's negligence is shown, recovery should not be barred merely because the mental distress served as an intermediate link in the chain of causation.[26] Additionally, widespread judicial dissatisfaction with the arbitrary results achieved under the rule seriously undermined its effectiveness and hastened its decline.[27] The intermediate effect of this dissatisfaction was the creation of exceptions to the rule where there was an inconsequential, slight impact;[28] where the mental distress preceeded the impact;[29] and where the mental distress was inflicted in a willful and wanton or grossly negligent manner.[30] The Mississippi Supreme Court, although denying recovery for negligently inflicted mental distress and its physical consequences,[31] followed the latter exception,[32] and, like many other courts which recognized the exception,[33] extended it to permit recovery for mental distress unaccompanied by physical injury.[34] The *Restatement of Torts*, however, was slow to recognize any

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822 (1890). *Contra*, Arnold v. Spears, 217 Miss. 209, 63 So. 2d 850 (1953); Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823 (1891) (requiring willful conduct). *See also* PROSSER, *supra* note 7, § 54, at 328-30.

[24] See note 37 *infra* for a list of those jurisdictions retaining the rule.

[25] *E.g.*, Alabama Fuel & Iron Co. v. Baladoni, 15 Ala. App. 316, 73 So. 205 (1916); Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941).

[26] *E.g.*, Sloane v. Southern Cal. Ry., 111 Cal. 668, 44 P. 320 (1896); Purcell v. St. Paul City Ry., 48 Minn. 134, 50 N.W. 1034 (1890); *cf.* RESTATEMENT OF TORTS § 313, comment *a* at 851 (1934).

[27] *See* 1 FLA. ST. U.L. REV. 670 (1973).

[28] *E.g.*, Christy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928) (evacuation of horse's bowels in lap); Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929) (slight burn); Porter v. Delaware, L. & W.R.R., 73 N.J.L. 405, 63 A. 860 (Sup. Ct. 1906) (dust in eye); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke).

[29] *E.g.*, Mitnick v. Whalen Bros. Inc., 115 Conn. 650, 163 A. 414 (1932) (automobile collision causing fear); Townsend v. Seefeld, 102 Kan. 302, 169 P. 1157 (1918) (labor pains induced by fear); Conley v. United Drug Co., 218 Mass. 238, 105 N.E. 975 (1914) (explosion causing fear).

[30] *E.g.*, State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (threats of physical and economic injury); Delta Finance Co. v. Ganakas, 93 Ga. App. 297, 91 S.E.2d 383 (1956) (intimidation of a child); Lyons v. Zale Jewelry Co., 246 Miss. 139, 150 So. 2d 154 (1963) (vindictive and abusive language).

[31] *E.g.*, Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937); Mississippi Power Co. v. Byrd, 160 Miss. 71, 133 So. 193 (1931).

[32] *E.g.*, Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935); Western Union Tel. Co. v. Koonce, 112 Miss. 173, 72 So. 893 (1916).

[33] *See, e.g.*, Boyle v. Chandler, 33 Del. 325, 138 A. 273 (1927); Kirksey v. Jernigan, 45 So. 2d 188 (Fla. 1950); Curnett v. Wolf, 244 Iowa 683, 57 N.W.2d 915 (1953).

[34] *E.g.*, Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1938). In T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972), the court stated:

such right to recovery.[35] More significantly, the exceptions used to circumvent the impact rule demonstrated that contemporaneous physical impact is not necessary to guarantee that alleged injuries are genuine.[36] Consequently, the rule is retained in only 10 American jurisdictions.[37] Nevertheless, the great majority of those jurisdictions which have rejected the impact rule have limited the application of tort principles by requiring that the plaintiff be in the zone of danger created by the defendant's negligence.[38] This limitation restricts liability in terms of the plaintiff's proximity to the physical risk created by the defendant's negligence and requires that the plaintiff's mental distress be caused by fear of physical injury or impact.[39] Its effect, grounded ostensibly in the doctrine of foreseeability,[40] has been to recognize a right of recovery by plaintiffs who fear for their own safety, and to deny recovery to bystander-plaintiffs whose mental

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> [D]amages may be recovered for emotional anguish, suffering, and emotional distress where the wrongful act causing such condition was intentionally or willfully done or done with such grossness and recklessness as to evince utter indifference to consequences.

Id. at 485.

[35] *Compare* RESTATEMENT OF TORTS § 46, comment c at 87 (1934), *with* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[36] The recognition that impact is not necessary to establish the genuineness of resulting physical injuries was substantially accelerated by advances in medicine and psychiatry during the first half of the 20th century. *See* Amdursky, *The Interest in Mental Tranquility*, 13 BUFFALO L. REV. 339 (1963); Smith, *supra* note 15, at 212-26.

[37] Arkansas—St. Louis I.M. & S.R.R. v. Bragg, 69 Ark. 402, 64 S.W. 226 (1901). District of Columbia—Perry v. Capital Traction Co., 32 F.2d 938 (D.C. Cir.), *cert. denied*, 280 U.S. 577 (1929). Florida—Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974). Illinois—Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898). *But cf.* Mayer v. Petzelt, 311 F.2d 601 (7th Cir. 1962), *cert. denied*, 373 U.S. 936 (1963) (applying Illinois law). Indiana—Boston v. Chesapeake & Ohio Ry., 223 Ind. 425, 61 N.E.2d 326 (1945). Iowa—Kramer v. Ricksmeier, 159 Iowa 48, 139 N.W. 1091 (1913). *But cf.* Watson v. Dilts, 116 Iowa 249, 89 N.W. 1068 (1902) (battery of plaintiff's husband). Kentucky—Kentucky Traction & Terminal Co. v. Roman's Guardian, 232 Ky. 285, 23 S.W.2d 272 (1929). Massachusetts—Spade v. Lynn & Boston R.R., 168 Mass. 285, 47 N.E. 88 (1897). *But cf.* George v. Jordan Marsh Co., 359 Mass. 244, 268 N.E.2d 915 (1971). Missouri—Brisboise v. Kansas City Pub. Serv. Co., 303 S.W.2d 619 (Mo. 1957). Utah—*cf.* Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961). *See also* Comment, *Torts: The Impact Rule—Nuisance or Necessity*, 25 U. FLA. L. REV. 368, 375 (1973).

[38] *E.g.*, Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965); Flazone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Savard v. Cody Chevrolet, Inc., 126 Vt. 405, 234 A.2d 656 (1967). *See* RESTATEMENT (SECOND) OF TORTS § 313 (1965).

[39] *See* Flazone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Niederman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970); Comment, *Negligence—Infliction of Emotional Harm—A Suggested Analysis*, 54 IOWA L. REV. 914 (1969); 43 TEMP. L.Q. 59 (1969).

[40] The infliction of mental distress to a bystander outside the zone of danger is said to be unforeseeable; therefore, foreseeable injury is arbitrarily circumscribed to the area of physical danger created by the defendant's negligence. *See* Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Shurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

distress is occasioned by the defendant's negligent injury of another, usually a close relative. The primary reasons offered in support of the limitation are policy considerations[41] similar to those articulated in the early impact rule decisions.[42] Though at least one early decision supported rejection of the zone of danger limitation,[43] only recently has the doctrine been specifically rejected.[44] In *Dillon v. Legg*,[45] the California Supreme Court allowed a mother—who was outside the zone of danger when she witnessed the defendant negligently kill her child—to recover for her mental distress and resulting physical injuries because, under the circumstances, her injury was foreseeable.[46] Viewing the zone of danger as an arbitrary limitation, the court stated that the proper approach to such claims is on a case-by-case basis. The court stated that it would approach subsequent questions of foreseeability[47] within the context of flexible guidelines articulated in terms of proximity to the incident, sensory observance of the incident, and the relation of the plaintiff and victim.[48] The few cases following *Dillon*[49] have

[41] *See, e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *overruled*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); Klassa v. Milwaukee Gaslight Co., 273 Wis. 176, 77 N.W.2d 397 (1956).

[42] See notes 10 & 16 and accompanying text *supra*.

[43] Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912).

[44] *See* 1969 U. ILL. L.F. 125.

[45] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). The court was faced with the quintessential zone of danger dilemma: how to justify recovery for the deceased child's sister who was within the zone and simultaneously to justify denying recovery to the mother, who, though not within the zone, was only a few yards away.

[46] Removing such arbitrary bars to the plaintiff's claim merely allows him to present his evidence, and does not, of itself, indicate that the plaintiff will recover. *See* 1 FLA. ST. U.L. REV. 670 (1973).

[47] Correctly applied, tort law would allow recovery if the plaintiff's injury is foreseeable from the point of the defendant's negligent act, and recovery would not be denied merely because the type of injury suffered by the plaintiff was not expected. Moreover, judicious application of a foreseeability standard within the context of general tort principles would not permit recovery for severe injuries resulting from the plaintiff's peculiar susceptability of which the defendant has no knowledge. However, the focus in precluding the plaintiff's action, a judicial policy determination, would be based upon the severity of the injury alleged weighed against the effect of allowing recovery. Using a case-by-case approach, absent any countervailing circumstances requiring dismissal of a particular claim, recovery can be allowed if the injury is severe, and stare decisis will eventually refine the extent of injury necessary to sustain an action. *See* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); PROSSER, *supra* note 7, §§ 53, 54; Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1417-20 (1961); Comment, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512 (1968). *See also* Smith, *supra* note 15, at 254-56, 303.

[48] It has been suggested that relational interests should be the primary focus in determining whether a bystander-plaintiff can recover. *See* Comment, *Emotional Disturbance Negligently Inflicted Upon Spectator Plaintiffs—A Suggested Model for Identifying Protected Plaintiffs Based on Relational Interests*, 13 UTAH L. REV. 396 (1969).

[49] *See, e.g.*, Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969) (not at scene); Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973) (fright from collision with front porch); Shurk v. Christensen, 80 Wash. 2d 652, 497 P.2d 937 (1972) (not at scene).

arisen under similar circumstances, where the genuineness of the injuries alleged was virtually assured.[50] Yet even *Dillon* and its progeny, which require assuredly exigent circumstances as well as medical proof to guarantee the genuineness of alleged injuries, have limited recovery to negligently inflicted mental distress accompanied by resulting physical injury.[51] The most liberal jurisdictions, with one notable exception,[52] uphold the general rule[53] that no recovery is available for negligently inflicted mental distress unaccompanied by objectively observable physical consequences. The great majority of American courts remain unconvinced that tort principles, tempered by judicial control of sympathetic juries, are sufficient to deal with these claims; they require resulting physical injury, therefore, to substantiate the genuineness of alleged mental injury.[54] Reflecting the views of a majority of jurisdictions, the *Restatement (Second) of Torts* recognizes a right to recover for mental injury only when it is accompanied by physical injury;[55] recovery would be denied to a bystander-plaintiff unless his injuries were sustained as a result of his presence within the zone of danger created by the defendant's negligence.[56] Paradoxically, the *Restatement (Second)* authorizes recovery where the defendant should realize that the mental distress caused by his negligent breach of duty involves an unreasonable risk of bodily harm. This provision implicitly abrogates the zone of danger limitation and provides a conceptual framework for the recognition of mental tranquility as independently deserving protection under general principles of tort law.[57]

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[50] *See, e.g.*, Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) (10-year-old seeing stepgrandmother negligently killed); Toms v. McConnell, 45 Mich. App. 667, 207 N.W.2d 140 (1973) (mother seeing child negligently killed). *See generally* Annot., 29 A.L.R.2d 1316 (1970).

[51] 16 VILL. L. REV. 1011, 1014 (1971).

[52] Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970).

[53] See note 23 *supra*.

[54] *See* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974), where the court stated:

> Because other standards exist to test the authenticity of the plaintiff's claim for relief, the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely admissible as evidence of the degree of mental or emotional distress suffered.

520 P.2d at 762.

[55] RESTATEMENT (SECOND) OF TORTS §§ 436A, 312, comment *a* at 110 (1965).

[56] *See id.* §§ 313, 436.

[57] If the actor's conduct is negligent as violating a duty of care designed to protect another from a fright or other emotional disturbance which the actor should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely through the internal operation of the fright or other emotional disturbance does not protect the actor from liability.

Id. § 436(1). This language, though requiring resulting physical injury, is incongruent with insisting that a bystander-plaintiff must have been injured while within the zone of danger in order to recover. A duty of care to protect another from fright must be designed by judges who can and do bend arbitrary barriers to recovery in cases of genuine physical injury. Once this step has been taken, it is not a substantially greater distance that must be traversed to recognize a right of recovery in cases of genuinely severe mental distress

In the instant case, the court reasoned that precedent from other jurisdictions which had rejected the impact rule served substantially to discredit the rule's rationale. The court further noted that Mississippi decisions allowed recovery for emotional distress if the defendant's conduct could be characterized as willful and wanton, even though there was neither impact nor resulting physical injury.[58] The court reasoned that the plaintiff's burden to show both negligence and consequential injury is the same where no impact is required and where slight impact must be proven. The court implied that "slight impact cases" permit recovery for mental and physical injuries resulting from negligent, nearly imperceptible contact, and that these cases have demonstrated that the impact requirement does not guarantee the genuineness of alleged injuries. The court recognized that excessive litigation has not resulted in jurisdictions which have abandoned the rule. For these reasons, a plaintiff's claim which alleges genuine, reasonably foreseeable injuries should not be dismissed merely because there has been neither trauma nor impact on his body. Moreover, the zone of danger test[59] was expressly disapproved since the court could perceive no merit in its arbitrary limitation.[60]

Through *Langley*, the Mississippi Supreme Court became a leader in the movement toward the recognition of mental tranquility as an area deserving independent tort protection. The court went further than rejecting the impact rule; it expressly disapproved the zone of danger limitation, finding it to be meritless.[61] Nevertheless, the court's summary manner and its failure to cite available supportive decisions[62] leaves the upshot of this portion of the holding

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unaccompanied by objectively observable physical injury. *See* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970). *See also* PROSSER, *supra* note 7, § 53, at 325; Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1019-28 (1928).

[58] See note 34 and accompanying text *supra*.

[59] See notes 40 through 46 and accompanying text *supra*. Significantly, limitation of recovery to plaintiffs injured while within the zone of danger would have precluded recovery in the instant case.

[60] The two cases cited by the court as recognizing a right of recovery by a plaintiff whose mental distress has not been occasioned by a fear of physical injury were not simple negligence cases. *See* Testerman v. H. & R. Block, Inc., 22 Md. App. 320, 324 A.2d 145 (1974) (analogy drawn to an action for libel and slander); Great Atl. & Pac. Tea Co. v. Roch, 160 Md. 189, 153 A. 22 (1931) (practical joke as an outrageous wrong).

[61] The court, reasoning that the defendant's conduct did not amount to a ruthless disregard of the plaintiff's rights, also affirmed the trial judge's refusal to submit the issue of punitive damages to the jury. Four dissenting justices, though concurring in the majority's abandonment of the impact doctrine, reasoned that the facts would support a jury award of punitive damages and would serve as an example to others to dismantle depository mechanisms immediately when dealing with similar complaints. Had the majority held otherwise, the significance of the instant decision could have been substantially reduced since, under Mississippi decisions, a finding that the defendant was grossly negligent or willful and wanton in his conduct would have, a fortiori, permitted recovery for mental distress even if neither impact nor resulting physical injury had been alleged. See notes 1 & 34 *supra*.

[62] See note 60 *supra*.

open to speculation and litigation. This could lead to two logical, yet divergent, results in future litigation. First, the holding in the instant decision could be limited to closely analagous fact situations; the zone of danger limitation would not be allowed to preclude recovery only where the defendant's negligence would create no realistic fear of immediate impact. Second, recovery could be allowed to a bystander-plaintiff whose mental distress has been occasioned by the defendant's negligent creation of a risk of injury to a third person. The latter result is logically consistent with an application of the genuine injury-foreseeability formula articulated in the instant decision. If the court is convinced the plaintiff's resulting physical injury is genuine and was foreseeable from the point of the defendant's negligent act, recovery should be permitted regardless of the proximity of the plaintiff to the zone of danger created by the defendant's negligence. Holding otherwise would require plaintiffs to fit within an arbitrary liability-limiting formula which would be an "almost impact" requirement. This interpretation would a fortiori reinstate the zone of danger limitation which was expressly disapproved in the instant decision and which is clearly illogical once the impact requirement has been rejected.[63] *Langley's* implications, though, go beyond its abandonment of the impact and zone of danger limitations where mental distress is accompanied by resulting physical injury. Although the plaintiff in the instant case suffered objectively observable physical injuries, the court held only that the plaintiff's injury must be genuine. The court did not limit "genuine" injuries to physical infirmities. Literally read, the holding recognizes an independent duty to refrain from the negligent infliction of mental distress. Consequently, *Langley* places the Mississippi Supreme Court in a position to provide creative leadership in articulating the extent to which breach of this independent duty will incur liability. Implicit in the court's rationale, and necessary to guard against imposing infinite liability, is a rule allowing recovery only when the defendant's negligence creates a foreseeable, unreasonable risk of severe emotional distress to a normal person, regardless of his proximity to any arbitrary zone of physical risk.[64] Whether the court will retain the tenor of the instant decision where no observable physical injury accompanies negligently inflicted mental distress remains to be seen. Since recovery has been allowed in Mississippi for mental distress without accompanying physical injury where the defendant engaged in grossly shameful conduct,[65] a refusal to allow a similar result where the defendant has been negligent would make recovery dependent upon characterization of the defendant's conduct. At best, such a refusal would permit judges to engage in semantic exercises

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[63] Inasmuch as this jurisdiction has nullified the impact prerequisite for recovery of damages in mental suffering cases, any requirement that a plaintiff must be in a "zone of danger" to recover must perforce fall since the zone-of-danger concept presupposes that a plaintiff will be close enough to the tortious activity to fear physical impact.

Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140, 144 (1973).

[64] *See* Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974); PROSSER, *supra* note 7, § 54; 1 FLA. ST. U.L. REV. 670, 682 (1973).

[65] Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 799, 178 So. 86, 87 (1938). See note 34 and accompanying text *supra*.

in allowing recovery for severe emotional distress. At worst, it would constitute an arbitrary bar to recovery for negligently inflicted severe emotional distress; where the defendant is more blameworthy the plaintiff's alleged injuries somehow become automatically tinted with an aura of genuineness to the judicial eye. The essential question is whether the court will continue to show confidence in the foreseeability-genuine injury formula articulated in the instant decision as a means of providing compensation for real injuries, mental as well as physical. Prohibiting plaintiffs from demonstrating the genuiness of their mental injuries would promote the injustice and arbitrariness at which the repudiation of the impact rule and the incipient rejection of the zone of danger limitation have been aimed.[66]

Dan W. Webb

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[66] Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237 (1971). See notes 27 & 45 and accompanying texts *supra*.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REQUIREMENT OF RECIPROCAL STANDARDS OF INSPECTION AS A CONDITION PRECEDENT TO IMPORTATION OF MILK DOES NOT VIOLATE THE COMMERCE CLAUSE

The Great Atlantic & Pacific Tea Company, Inc.[1] sought declaratory and injunctive[2] relief against the chief health officer of the State of Mississippi who, on the basis of a state milk regulation,[3] had denied the plaintiff a permit to deliver its milk processed in Louisiana to its retail stores in Mississippi. Section 11[4] of the milk regulation conditioned the entry into Mississippi markets of milk processed in other states upon the processing state's reciprocal acceptance of milk produced and processed in Mississippi. Although Louisiana had not entered into a reciprocity agreement with Mississippi, the plaintiff's milk appeared otherwise to meet the health-related standards of section 11.[5] Defendant accepted milk from four other Louisiana plants which were shipping processed milk into Mississippi prior to the adoption of section 11.[6] Plaintiff contended that application of the reciprocity requirement of section 11 to wholesome milk

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[1] The plaintiff, also called A & P, was a Maryland corporation authorized to do business in both Louisiana and Mississippi. Great Atl. & Pac. Tea Co. v. Cottrell, 383 F. Supp. 569, 570 (S.D. Miss. 1974) (per curiam), *prob. juris. noted*, 95 S. Ct. 1949 (1975) (No. 74-118).

[2] A preliminary injunction had been denied in the absence of a three-judge court to consider the constitutionality of a regulation of statewide import, and because the plaintiff had failed to show irreparable harm. 383 F. Supp. at 570.

[3] The Regulation Governing the Production and Sale of Milk and Milk Products was adopted by the Mississippi State Board of Health on December 14, 1967. *Id.*

[4] Section 11 provided:

> Milk and milk products from points beyond the limits of routine inspection of the State of Mississippi or its police jurisdiction, may be sold in the State of Mississippi or its police jurisdiction, provided they are produced, pasteurized and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. The health authority is authorized to require and conduct laboratory analysis and investigations to determine if the milk and milk products are in compliance with this Regulation.

Id. at 571.

[5] The supervisor of the Milk Control Program, Mississippi State Board of Health, testified that he had seen the results of inspections of the plaintiff's plant, and that the plant and its processed milk would be acceptable to the defendant because the Louisiana regulations were substantially equivalent to those of Mississippi. *Sanitation Compliance and Enforcement Ratings of Interstate Milk Shippers*, published by the U.S. Health, Education and Welfare Department on April 1, 1972, showed that plaintiff's milk received a rating of 100 percent on its plant and a pasteurized milk rating of 98 percent. *Id.* at 571-72.

[6] The defendant also accepted milk from two Alabama plants which were shipping milk into Mississippi prior to adoption of section 11. Alabama has no reciprocity agreement with Mississippi. *Id.* at 572.

imposed an undue and arbitrary burden on interstate commerce in violation of the commerce clause[7] and that defendant's rejection of plaintiff's milk while accepting milk from other Louisiana processors denied plaintiff equal protection of the laws as guaranteed by the fourteenth amendment.[8] Defendant contended that section 11 lowered trade barriers between Mississippi and other states by admitting milk on the basis of reciprocal standards of inspection[9] and that such reciprocity is necessary to ensure compliance by out-of-state milk processors with minimum health standards for milk imported into Mississippi. The three-judge United States District Court for the Southern District of Mississippi, *held*, relief denied. Where a state waives its inspection of out-of-state milk processing plants by accepting processed milk satisfying another state's inspection standard substantially equivalent to its own, the regulating state may further condition the admittance of that processor's milk upon the processing state's agreement to reciprocal acceptance of milk processed in the regulating state.[10] The fact that the regulating state does not impose this additional condition on all out-of-state processors does not deny the affected processor equal protection of the laws. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 383 F. Supp. 569 (S.D. Miss. 1974) (per curiam), *prob. juris. noted*, 95 S. Ct. 1949 (1975) (No. 74-1148).

In *Gibbons v. Ogden*,[11] Chief Justice John Marshall adumbrated the doctrine that the commerce clause, even in the absence of federal legislation, limits state regulatory powers.[12] In advancing the concept of an exclusive national commerce power, Marshall characterized inspection, quarantine, and health laws as proper subjects of state legislation.[13] Subsequent Supreme Court decisions[14] further implied there may be circumstances in which state regulations, seemingly involving interstate commerce, are not offensive to the "exclusive" regulatory power of Congress. The Court first articulated clear standards to guide its decisions in *Cooley v. Board of Wardens*[15] where it recognized that some subjects of commerce, national in character, should be uniformly regulated by

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[7] U.S. CONST. art. I, § 8.

[8] *Id.* amend. XIV, § 1.

[9] The defendant claimed that Mississippi lowered trade barriers by waiving its own stricter milk standards. To support that claim, the defendant presented evidence purporting to show that Mississippi's inspection standards were more stringent than those of Louisiana. However, a letter from the Louisiana State Health Officer to A & P stated that Mississippi-processed milk did not meet Louisiana's standards. 383 F. Supp. at 570, 575.

[10] In this regard the court also found that the processing state which had refused reciprocity was not an indispensable party to the suit. *Id.* at 575.

[11] 22 U.S. (9 Wheat.) 1 (1824).

[12] *Id.* at 196-200; *see* F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 12 (1937).

[13] 22 U.S. (9 Wheat.) at 203.

[14] *See, e.g.*, California v. Thompson, 313 U.S. 109 (1941) (state's exaction of license fee and bond from travel agent); Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 244 (1829) (implying a health-motivated state act authorizing a dam on a navigable stream is a valid police regulation); *cf.* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963) (Federal Aviation Act does not preclude state regulation of racial discrimination in employment.).

[15] 53 U.S. (12 How.) 299 (1851).

Congress, while other local subjects demand flexible treatment and are more advantageously regulated by the individual states.[16] The *Cooley* principle subsequently was used to invalidate a state licensing statute which discriminated against products of other states[17] and another state regulation which attempted to exclude completely certain items.[18] Although it recognized local health regulations as an exception to the general principle that every citizen has an undeniable right to conduct interstate commerce without being unduly burdened by state regulation,[19] the Court did not hestitate to invalidate state health regulations which operated to exclude all meat slaughtered in other states.[20] Similarly, the Court voided a state's method of determining wholesomeness which prescribed a mode of inspection to which products of other states could not have reasonably conformed.[21] Between 1900 and 1940 the Court constantly reviewed state regulations[22] and, without expressly abandoning the *Cooley* principle, employed a variety of rather conclusory expressions such as "burdens upon"[23] interstate commerce or "direct" and "indirect burdens."[24] During this period the Court decided *Baldwin v. G.A.F. Seelig, Inc.*,[25] the leading case on state milk regulation, in which the Court refrained from the "direct" and "indirect" analysis[26] in invalidating a state statute requiring payment of set minimum prices to out-of-state producers. The Court found the avowed purpose of the statute was suppression of outside competition,[27] and Justice Cardozo announced the now classic principle, "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."[28] *Milk Control Board v. Eisenberg Farm Products*[29] upheld a state

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[16] *Id.* at 319.

[17] Welton v. Missouri, 91 U.S. 275, 282 (1876).

[18] Leisy v. Hardin, 135 U.S. 100, 124-25 (1890).

[19] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[20] Brimmer v. Rebman, 138 U.S. 78 (1891) (only meats taken from animals slaughtered more than 100 miles from point of sale subjected to costly inspection).

[21] Minnesota v. Barber, 136 U.S. 313, 328 (1890) (animals from which meat is taken required to be inspected in the regulating state within 24 hours before slaughter).

[22] In the decade of 1921 to 1930 the Court judged the validity under the commerce clause of 72 state regulatory and tax laws. B. GAVIT, THE COMMERCE CLAUSE 490-520 (1932).

[23] *E.g.*, Lemke v. Farmers Grain Co., 258 U.S. 50, 59 (1922).

[24] Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 451-52 (1951); *see, e.g.*, Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917); Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914); Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911); New York, N.H. & H.R.R. v. New York, 165 U.S. 628 (1897).

[25] 294 U.S. 511 (1935).

[26] Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis.

Id. at 522.

[27] *Id.*

[28] *Id.* at 527.

[29] 306 U.S. 346 (1939).

regulation requiring milk dealers to pay minimum prices to producers within the state and to post bonds for their protection, concluding the regulation was designed to reach an essentially local situation lending itself to diversity of treatment, and the regulation only "incidentally or indirectly involves or burdens interstate commerce."[30] During the next several years, the Court formulated a new standard of review for state regulations which balanced the competing demands of local and national interests.[31] However, in *H.P. Hood & Sons v. Du Mond*[32] the Court made no attempt to weigh the state interest in protecting itself from local destructive competition in its milk market.[33] In *Hood* a milk regulation which prohibited processors from establishing plants in areas which the state had determined were adequately served was invalidated, the Court holding the regulation was designed to aid local economic interests.[34] In *Dean Milk Co. v. City of Madison*,[35] the Court considered a municipal milk regulation which purported to protect the health of local residents but, in effect, excluded wholesome milk originating in a neighboring state. The Court found there were "reasonable non-discriminatory alternatives"[36] which were adequate to protect the local health interest, *viz.* the city could make its own inspections of out-of-state milk plants and charge the reasonable costs incurred, or the city could accept milk which had passed similar inspections in the other state.[37] Although this newly articulated "reasonable alternatives" doctrine was not necessary to the decision in *Dean*,[38] nor in fact, original,[39] it was probably the most pragmatic

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[30] *Id.* at 351.

[31] When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.

Parker v. Brown, 317 U.S. 341, 362 (1943). The adoption of the balancing standard had been advocated several years before in the seminal article, Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

[32] 336 U.S. 525 (1949).

[33] "[I] cannot agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes." *Id.* at 564 (Frankfurter, J., dissenting). The majority opinion made no serious effort to discuss the nature of the state's interest. *See* 8 WASH. & LEE L. REV. 202, 202-03 (1951), suggesting *Hood* followed the "rational basis" standard of State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

[34] 336 U.S. at 530-31.

[35] 340 U.S. 349 (1951).

[36] *Id.* at 354.

[37] *Id.* at 355.

[38] More than half a century before, the Court held:

Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void.

Brimmer v. Rebman, 138 U.S. 78, 82 (1891). However, reliance on *Brimmer's* "direct burden" language would not be consonant with the newly articulated balancing standard.

[39] 12 U. PITT. L. REV. 440, 441-42 (1951) compares *Dean* with Minnesota v. Barber,

approach consonant with the balancing standard.[40] One of the alternatives mentioned in *Dean*, that the city make its own inspection, was the basis for the recent holding in *Dixie Dairy Co. v. City of Chicago*[41] that a city, even in a state which admits milk on the basis of reciprocity,[42] may insist on making its own periodic inspections of producers and processors. The latest Supreme Court decision on milk regulations is *Polar Ice Cream & Creamery Co. v. Andrews*,[43] where the Court again invalidated a state statutory scheme which was intended to, and did, in fact, secure advantages for local milk producers and exclude out-of-state milk from a major portion of a state's milk market by requiring local processors to purchase all milk offered to them by local producers.

State police powers, like any others, are susceptible to unequal application. The leading case, *Yick Wo v. Hopkins*,[44] held unconstitutional the knowing enforcement of a safety ordinance against a limited class of persons.[45] Subsequent decisions in other areas indicated there was a denial of equal protection only where there was an element of intentional or purposeful[46] discrimination, not chance or mere error of judgment.[47] The constitutional prohibition of intentionally discriminatory administration of laws is analogous to the prohibition of enactment of laws which, by their terms, make classifications not based on differences having a rational relation to the object of the legislation.[48] In the latter situation, distinctions in the treatment of business entities engaged in the same activity cannot be justified when there are no genuine differences between them or where the discriminatory treatment is not reasonably related to real differences.[49] Differing treatment of established businesses may be based on tenure only if reasonably related to a proper legislative purpose.[50]

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136 U.S. 313 (1890); 1951 WIS. L. REV. 755 points out the "alternatives" aspect of *Baldwin*.

[40] *See* note 38 *supra*. "The true choice is between public health regulations that have a trade-barrier aspect and equally effective regulations that do not." Burtis, *Barriers & the Milk Industry*, 16 IND. L.J. 191, 193 (1940).

[41] 355 F. Supp. 1351, 1358 (N.D. Ill. 1973).

[42] *Id.* at 1357-58. The applicable state statutes did not preclude the city's enforcing more stringent standards.

[43] 375 U.S. 361, 376-77 (1964).

[44] 118 U.S. 356 (1886).

[45] Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74.

[46] *E.g.*, Snowden v. Hughes, 321 U.S. 1, 8 (1944) (failure to certify election results correctly).

[47] Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 353 (1918) (undervaluation of similar property by city tax officials).

[48] The rational relation requirement was articulated in Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[49] Morey v. Doud, 354 U.S. 457, 466 (1957); Hartford Ins. Co. v. Harrison, 301 U.S. 459, 463 (1937).

[50] Dukes v. City of New Orleans, 501 F.2d 706, 711 (5th Cir. 1974), *prob. juris. noted*, 95 S. Ct. 1556 (No. 74-775).

In the instant case, the court found that section 11 of the Mississippi milk regulation, insofar as it is patterned after section 11 of the U.S. Public Health Service Model Milk Ordinance,[51] is a valid exercise of state police powers. The court found further that section 11, including the reciprocity clause, unlike the state regulations considered in *Baldwin* and its progeny, was not designed to erect trade barriers for the protection of local economic interests against outside competition.[52] Relying on *Dixie Dairy Co. v. City of Chicago*, the court stated that either Louisiana or Mississippi may enforce its own health and sanitation standards through inspections at the milk source or by waiving its own inspection and adopting reciprocal agreements. The court noted that although *Dixie Dairy* held a state may not be compelled to relinquish its police power on the basis of reciprocity, that case did not hold a state cannot insist on reciprocity in lieu of out-of-state inspections. The court reasoned that as long as Mississippi mutually exchanges standards of inspection with other states, there can be no burden on interstate commerce.[53] Aided by the broad principle of *Milk Control Board v. Esienberg Farm Products*, the court concluded that section 11 does not exceed the constitutional bounds of state police powers even though it incidentally burdens or involves interstate commerce.[54] Without expounding, the court rejected the plaintiff's equal protection claim, reasoning that a contrary holding would prohibit Mississippi from exercising, in the future, its reciprocity clause with respect to milk processors in Alabama and Louisiana.[55]

In an attempt to give Mississippi great latitude in its methods of ensuring the wholesomeness of imported milk, the instant decision introduced the idea that a state, by attempting to lower trade restrictions and by making concessions of its own, can effectively require similar gestures by other states before producers in those other states can export milk into the importing state. Superficially, at least, the instant case greatly differs from the *Baldwin* line of cases[56] in which states had created trade barriers to protect their local economic interests. There appears to be no opposition in those cases to a state statutory scheme designed to increase commercial intercourse through cooperation.[57] Even *Dean's* "reasonable nondiscriminatory alternatives" doctrine can be satisfied by the

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[51] The U.S. Public Health Service recommended a Model Grade A Pasteurized Milk Ordinance in 1939 and a revised model ordinance in 1965. These proposed ordinances are only recommendations and are not required by federal law. Dixie Dairy Co. v. City of Chicago, 355 F. Supp. 1351, 1354 n.3 (N.D. Ill. 1973).

[52] The court described those cases as involving "price and area discriminations." 383 F. Supp. at 575.

[53] Specifically, the court found section 11 presented no barriers between Mississippi and those states which agree to reciprocity. *Id.* at 570.

[54] The court stated the problem in the instant case arose because Louisiana, not Mississippi, refused reciprocal standards. *Id.* at 575.

[55] In this regard the court stated: "If the reciprocity clause could be said to be retaliatory in nature, the guilty party is Louisiana, not Mississippi." *Id.* at 576.

[56] Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); and H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) were all based largely on *Baldwin*.

[57] Of course, those cases dealt with the opposite situation where the Supreme Court found the states had intended to obstruct commerce.

three-judge court's implicit conclusion that section 11 is not discriminatory.[58] However, in its opinion, the court did not consider that the Supreme Court has used "discriminatory" to refer to both intentionally discriminatory measures and measures whose practical effects were to restrict interstate commerce.[59] In this light, it is more difficult to reconcile the reciprocity clause of section 11 with the rationale of *Dean*.[60] It is arguable that Mississippi adopted strict reciprocity solely for the economic benefit of reduced inspection costs,[61] in conflict with the policy expressed in *Baldwin* and its progeny. On analysis, section 11 effectively excluded the plaintiff's wholesome milk, even though the plaintiff had satisfied all requirements which it could control. The only requirement which A & P could not satisfy, the reciprocity clause, stems solely from the fact that A & P processes milk in Louisiana, a state which does not choose to enter into a reciprocity agreement with Mississippi .[62] Furthermore, Louisiana has the right to set its own health standards[63] and to enforce them by inspections[64] at the milk source. In view of the instant decision, the choices for Louisiana are either to agree to reciprocity or to lose any processors which choose to export milk to Mississippi. In the framework of Louisiana vis-a-vis Mississippi, Louisiana's dilemma is, perhaps, not costly.[65] In the framework of A & P vis-a-vis Mississippi, however, A & P has no choice since a third party, Louisiana, standing by its court-acknowledged rights, has refused reciprocity. There are at least three conflicting rights: the right of Mississippi to require reciprocity in lieu of its own inspections;[66] the right of Louisana to set its own health standards and to make

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[58] "The fact that Mississippi has engaged and expects to continue to engage in reciprocity militates against invalidating Section 11." 383 F. Supp. at 575.

[59] *Compare* Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) ("In . . . erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce."), *with* Minnesota v. Barber, 136 U.S. 313, 322 (1890) ("[T]he act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb or pork . . . slaughtered in other States . . . .").

[60] A & P's milk is excluded, not for health reasons, but to further a particular method Mississippi has chosen. In effect, the location of A & P's plant determines the result.

[61] The supervisor of the Mississippi Milk Control Program testified that reduced inspection costs motivated the adoption of the reciprocity clause. 383 F. Supp. at 576.

[62] The opinion in the instant case never challenges the legality of Louisiana's choice. On the contrary, the court stated:

> [T]he right of either *Louisiana* or Mississippi to enforce its own standards, either through inspections at the source of the processed milk, although such may require out-of-state inspections, or through reciprocal agreements is unquestioned.

Id. at 575 (emphasis added).

[63] Dixie Dairy Co. v. City of Chicago, 355 F. Supp. 1351, 1357 (N.D. Ill. 1973) ("[T]he protection of public health through local regulation and inspection of milk products outweighs the burden placed on private enterprise.").

[64] See note 62 *supra*.

[65] However, exporting plants in Louisiana add to the tax revenue of the state and provide employment for its citizens.

[66] [*Dixie Dairy*] does not hold that a state cannot insist on reciprocity in lieu of out-of-state inspections. Mississippi may still insist on compliance with

its own inspections;[67] and the right of A & P to engage in interstate commerce without unreasonable restrictions.[68] The instant decision elevates Mississippi's method of ensuring milk wholesomeness above the other two rights, even though there are adequate, less burdensome alternatives.[69] Balancing Mississippi's interest in employing a particular health-related method against the national interest in unrestricted trade, it appears less costly in our federal system to require Mississippi to adopt less drastic means to exercise its acknowledged police powers.[70]

In the instant decision, the court did not squarely address the plaintiff's equal protection claim. Since defendant continues to enforce section 11 against A & P with knowledge that four other Louisiana processors escape enforcement, the regulation is being enforced discriminatorily. The fact that those four processors were shipping milk into Mississippi prior to the adoption of section 11 in no way implies that they will continue to satisfy the interests which the reciprocity clause is designed to conserve.[71]

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its own health and sanitation standards, and it may continue to waive its requirements as provided in Section 11.

383 F. Supp. at 575.

[67] See note 62 *supra*.

[68] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution . . . .

Id. at 57.

[69] Mississippi can make its own inspection and charge the reasonable costs as suggested in *Dean*. 340 U.S. at 354-55.

[70] Although it may be argued that invalidation of section 11 would interfere with Mississippi's sovereignty over local concerns, such invalidation would affect only Mississippi's methods, not her substantive police powers.

[71] *See* Morey v. Doud, 354 U.S. 457, 466-67 (1957), where the Court invalidated an Illinois statute exempting American Express from licensing and regulatory requirements imposed on money order issues. Although the exemption was grounded on the company's stability and preeminence, the Court noted that the statutory exemption would have precluded regulation whether or not American Express retained its favored characteristics.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—INDIGENT DEFENSE SERVICES ALLOWED ONLY ON SHOWING OF NECESSITY

Eugene Mason,[1] an indigent convicted of murder, sought release on a writ of habeas corpus, alleging that he was denied sufficient state funds[2] to secure a private investigator.[3] Petitioner contended that refusal to provide these funds violated the due process clause of the fourteenth amendment in denying him effective assistance of counsel, thereby depriving him of the constitutional safeguards of confrontation and cross-examination. Petitioner further contended that disallowing these funds violated the fourteenth amendment guarantee of equal protection in denying him assistance equal to that received by indigent defendants represented by the Maricopa County Public Defender's office.[4] The Supreme Court of Arizona had upheld the conviction despite the refusal by the lower court to provide funds for investigative services.[5] Petitioner's request for habeas corpus relief was denied by the United States District Court of Arizona.[6] On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, affirmed. Where an indigent defendant alleges denial of due process or equal protection under the fourteenth amendment due to a denial of investigative services at state expense, a writ of habeas corpus will issue only when substantial prejudice to the defendant has been shown by clear and convincing proof. *Mason v. Arizona*, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 1145 (1975).

The history of state-funded services to indigent defendants begins with *Powell v. Alabama*[7] where the United States Supreme Court held that indigent defendants in capital cases were entitled to court-appointed counsel.[8] In *Powell* the Court based its decision on the due process clause of the fourteenth amendment rather than on the sixth amendment right to counsel.[9] In 1938, the Court

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[1] Originally, both Eugene Mason and Thomas Sanchez were charged with the murder of Charlie Byrn; however, the prosecutor decided to drop charges against Sanchez and call him as a state's witness. Mason v. Arizona, 504 F.2d 1345, 1350 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 1145 (1975).

[2] The court of appeals noted that the record did not indicate whether a claim for costs of obtaining interrogatories was either filed with or paid by the state court. *Id.* at 1350 n.4.

[3] At trial, Mason's counsel provided inadequate justification for court appointment of an investigator and did not show why counsel could not personally have conducted the investigation. More explicit reasons were given on appeal, involving primarily discovery of means of impeachment of two key prosecution witnesses. The court of appeals, per Hamley, J., noted from the record, however, that one of the two had not testified and the defense appeared to have detailed knowledge about the other. *Id.* at 1352-53.

[4] The Maricopa County Public Defender's office had an investigative staff which originally was available to the defendants. When the office was allowed to withdraw from the defense, however, it was relieved of investigative responsibility as well. *Id.* at 1349.

[5] State v. Mason, 105 Ariz. 466, 466 P.2d 760 (1970).

[6] Mason v. Arizona, 360 F. Supp. 56 (D. Ariz. 1973).

[7] 287 U.S. 45 (1932).

[8] *Id.* at 71.

[9] *Id.*

held that indigents tried in the federal courts must have the opportunity to be represented by an appointed attorney.[10] Refusing to extend this view to the state courts in *Betts v. Brady*,[11] the Court implied that a fair trial could still be had without the assistance of counsel.[12] In *Gideon v. Wainwright*,[13] the Court expanded, at least partially, the federal rule to the state courts by requiring appointed counsel for indigent defendants in felony prosecutions.[14] Later, the right to an appointed attorney was extended to all cases where imprisonment might be imposed[15] and to all stages of the prosecution which might be considered "critical."[16] Today, evidence derived through the use of private investigators and scientific assistance is prevalent in criminal cases.[17] While the Court in recent decisions has presupposed that defendants will have the use of expert witnesses and investigators,[18] in 1953, in *United States ex rel. Smith v. Baldi*,[19] the Court rejected the theory that pretrial denial of psychiatric assistance to the defense constituted a denial of adequate counsel. The Court said, in dictum, "We cannot say that the State has that duty by constitutional mandate."[20] Nevertheless, *Baldi* is not dispositive of the issue of investigative services for

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[10] Johnson v. Zerbst, 304 U.S. 458 (1938).

[11] 316 U.S. 455 (1942).

[12] *Id.* at 473.

[13] 372 U.S. 335 (1963).

[14] *See id.* at 351 (Harlan, J., concurring).

[15] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[16] *Id.* at 37. The Supreme Court has determined that the following are critical stages: *appeals*—Douglas v. California, 372 U.S. 353, 357 (1963); *arraignment*—Hamilton v. Alabama, 368 U.S. 52, 54 (1961); *interrogation*—Miranda v. Arizona, 384 U.S. 436, 464-65 (1966); *juvenile hearings—In re* Gault, 387 U.S. 1, 41 (1967); *post-indictment lineup proceedings*—Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Wade, 388 U.S. 218, 227 (1967); *preliminary hearings*—Pointer v. Texas, 380 U.S. 400, 410 (1965); White v. Maryland, 373 U.S. 59, 60 (1963); *sentencing and revocation of probation*—Gagnon v. Scarpelli, 411 U.S. 778, 786-87, 790-91 (1973); Mempa v. Rhay, 389 U.S. 128, 137 (1967). *But see* Ross v. Moffit, 417 U.S. 600, 619-21 (1974) (limiting the scope of the guarantee to appeals as a matter of right through a narrow reading of Douglas v. California, *supra*).

[17] Defense investigation at the earliest possible stage has become a routine expectation in most sophisticated judicial arenas. The need to obtain experts before perishable or transitory evidence is lost is becoming increasingly frequent as the courts come to depend more and more on science and technology to assist them in resolving issues of fact.

NAT'L ADVISORY COMM'N ON CRIM. JUSTICE STANDARDS AND GOALS, COURTS 254 (1973) (citations omitted) [hereinafter cited as NAT'L ADVISORY COMM'N].

[18] The Court, discussing critical stages necessary for counsel, discounted the need for counsel when blood samples, fingerprints, or handwriting exemplars were taken. The Court reasoned that if something were wrong with the way they were taken or used, the defendant would be adequately protected through the use of cross-examination and the presentation of evidence through his own expert witnesses. Gilbert v. California, 388 U.S. 263, 267 (1966); United States v. Wade, 388 U.S. 218, 228-29 (1966).

[19] 344 U.S. 561 (1953).

[20] *Id.* at 568.

indigent defendants.[21] The rapid development of technical and scientific assistance has placed the indigent defendant at a great disadvantage.[22] Although the states have accepted the proposition that legal counsel appointed by the courts must be paid,[23] many have refused to provide defense services beyond representation by counsel.[24] As a result, the appointed counsel is often placed in an unfair position.[25] A variety of constitutional arguments[26] have been advanced in attempts to force the states to provide further needed services to indigent defendants.[27] It is often contended that the refusal to provide expert services constitutes denial of due process,[28] on the theory that the services are necessary to a full defense against the charges.[29] Therefore, it is argued that the government's failure to provide the services contravenes the defendant's right to a fundamentally fair trial, guaranteed to him by the due process clause. *McGarty v. O'Brien*[30] held that the absence of expert witnesses was not a denial of due

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[21] *Id. Baldi* was decided prior to *Gideon*; thus, at that time, it was not even mandatory for the states to provide counsel for indigents.

[22] "[T]he right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires." Bush v. McCollum, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965). *See* ABA, PROVIDING DEFENSE SERVICES 22 (approved draft 1968).

[23] *See* Annot., 21 A.L.R.3d 819 (1968).

[24] For a catalogue of those states which provide defense services, see note 62 *infra*.

[25] "Assigned attorneys are often young attorneys or others who lack experience in criminal law, hence they are no match for the prosecuting attorney." L. SILVERSTEIN, DEFENSE OF THE POOR 20 (1965) (emphasis in original deleted).

[26] *See generally* LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME LAW. 41 (1974); Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973).

[27] "At the present time, it is estimated that 83% of all public defenders have no investigators." LaFrance, *supra* note 26, at 54 (footnotes omitted).

[28] The concept of due process has always proved difficult of judicial definition. Generally, the Supreme Court has refused any attempt at a definition except by gradual process of inclusion and exclusion. . . . This open-ended approach has the virtue of reducing the scope of the Court's decisional duties, but at the same time it tends to increase its discretion.

Haigh, *Defining Due Process of Law: The Case of Mr. Justice Hugo L. Black*, 17 S.D.L. REV. 1 (1972) (footnotes omitted).

> The Court has come to regard the Bill of Rights as an authoritative listing of fundamental individual rights to which it refers when it becomes necessary to decide whether a particular right denied or abridged in a particular case is guaranteed by due process of law.

Id. at 38; *see* Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 493 (1973).

[29] *See* McGarty v. O'Brien, 188 F.2d 151, 155 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951); *cf.* State v. Bowen, 104 Ariz. 138, 449 P.2d 603, 605, *cert. denied*, 396 U.S. 912 (1969).

[30] 188 F.2d 151 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951). *See* State v. Bowen, 104 Ariz. 138, 449 P.2d 603, *cert. denied*, 396 U.S. 912 (1969); San Miguel v. McCarthy, 8 Ariz. App. 323, 446 P.2d 22 (1968).

process if the defendant had access to the prosecution's witnesses. Since this decision, other cases have held that the denial of these defense services, when needed, effectively amounted to a denial of due process.[31] Denial of equal protection is another frequently urged constitutional theory used to seek expanded indigent criminal defense services. Essentially, the defendant contends that he is placed in an inherently unequal position when he is denied expert services that are available to the prosecution[32] and to the affluent.[33] This argument involves the use of differing standards of judicial review, depending on the nature of the claim that the defendant asserts. "Strict review"[34] attaches if the defendant can show that the state has placed him in a "suspect classification"[35] or that the state has acted in such a manner as to violate one of his "fundamental rights."[36] The Court, however, has been reluctant to expand the number of "fundamental rights."[37] In *San Antonio Independent School District v. Rodriguez*,[38] the Court held that wealth, or the lack of wealth, was not a suspect classification. The majority stated:

> [T]he class it [the Texan system of financing public education] de-

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[31] *Cf.* Lee v. Habib, 424 F.2d 891, 894 (D.C. Cir. 1970); Christian v. United States, 398 F.2d 517, 519 n.7 (10th Cir. 1968); Bush v. McCollum, 231 F. Supp. 560, 564-65 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965); United States v. Germany, 32 F.R.D. 421 (N.D. Ala. 1963).

[32] *See* Margolin & Wagner, *supra* note 26, at 653-58.

[33] *See* Griffin v. Illinois, 351 U.S. 12, 15 (1956).

[34] As contrasted with traditional standards of judicial review, exacting judicial examination of the *effect, rationale* and *intent* of legislation, where legislation is given no presumption of constitutionality and where the state must give compelling justification if the legislation is to be upheld, it is called *strict review*.

Goodpaster, *supra* note 28, at 488 (emphasis added). *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944). Any interest claimed by a state to be compelling "even though enacted pursuant to a valid state interest, bears a *heavy* burden of *justification* . . . and will be upheld only if it is *necessary*, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, *supra* at 196 (footnotes omitted and emphasis added).

[35] The Court has held the following to be suspect classifications: *alienage—In re* Griffith, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); *illegitimacy*—Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); *race*—Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964); Korematsu v. United States, 323 U.S. 214 (1944). Strict scrutiny has also been applied to procedural disparity, Griffin v. Illinois, 351 U.S. 12 (1956), and to infringement upon the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969).

[36] The United States Supreme Court recently listed the fundamental rights in the case of Village of Belle Terre v. Boraas, 416 U.S. 1 (1973). The following rights were listed: "[v]oting; the right of association; the right of access to the courts; or any rights of privacy." *Id.* at 7 (citations omitted).

[37] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972) (refusing to include education as a fundamental right). Thus, it is doubtful that expert defense services will be included among the fundamental rights.

[38] *Id.*

> fines have none of the traditional indicia of suspectness: The class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[39]

Rodriguez indicates that the indigent defendant's poverty cannot be used to require strict scrutiny when the state denies him investigative services. If strict review is unavailable, then the second test, "traditional review" must be used. Under the "traditional review" standard all that must be shown is "some rational relationship to legitimate state purposes."[40] The Court, in *Griffin v. Illinois*,[41] held there was no rational relation between a person's guilt or innocence and his ability to finance his case.[42] The Court stated, through Justice Black, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[43] Later, in *Douglas v. California*,[44] it was announced that in order to have equal justice, the state must provide an attorney for an indigent on appeal.[45] While the cases have not held that an indigent should be accorded every service that an affluent person might obtain, it can be fairly stated that the state should make every effort to bring about a "rough equality."[46] Closely associated with due process and equal protection is the right to assistance of counsel.[47] The term "effective" assistance of counsel was first used in *Powell v. Alabama*.[48] Since its initial use in *Powell*, several cases have

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[39] *Id.* at 28.

[40] *Id.* at 40.

> In applying that clause [equal protection], this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citations omitted), *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[41] 351 U.S. 12 (1956).

[42] *Id.* at 29.

[43] *Id.* at 19.

[44] 372 U.S. 353 (1963).

[45] *But see* Ross v. Moffit, 417 U.S. 600 (1974) (limiting this right to appeals granted as a matter of right).

[46] Goodpaster, *supra* note 28, at 493-94.

[47] U.S. CONST. amend. VI.

[48] 287 U.S. 45, 71 (1932). Referring to the constitutional right to counsel, the Fifth Circuit has stated:

> Effective counsel includes familiarity of counsel with the case and an opportunity to investigate it if necessary in order meaningfully to advise the accused of his options. An accused represented by appointed counsel has a right to expect a measure of devotion to his cause at least equal to that expected from retained counsel of the accused's own choosing.

Calloway v. Powell, 393 F.2d 886, 888 (5th Cir. 1968) (citations omitted). For a full discussion of effective counsel, see Bazelon, *The Defective Assistance of Counsel*, 42 U.

held that effective assistance of counsel does not demand defense services at state expense.[49] The clear trend since *Gideon*, however, seems to favor allowing such services at state expense.[50] In *People v. Watson*,[51] the Illinois Supreme Court held that in order for the defendant to have any real use of the right of compulsory process, the state must pay for the indigent defendant's expert witnesses.[52] *Watson* appears to stand alone, however. While the Constitution specifically provides for compulsory process,[53] states generally provide compensation for an expert witness who must specially prepare and study in order to testify.[54] Congress sought to improve the position of the indigent in the federal courts by passage of the Criminal Justice Act of 1964.[55] The Act provides for expert and investigative services for an indigent defendant in the federal courts.[56] The practical procedures of the Act require that the court determine, in an ex parte hearing,[57] if the services are necessary[58] for an adequate defense.[59]

CIN. L. REV. 1 (1973); Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Grano, *The Right to Counsel : Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970); Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Comment, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299 (1973); Comment, *The Right to Effective Assistance of Counsel*, 42 MISS. L.J. 213 (1971).

[49] *E.g.*, United States v. Brodson, 241 F.2d 107 (7th Cir. 1957); McGarty v. O'Brien, 188 F.2d 151 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951).

[50] LaFrance, *supra* note 26, at 54. *See* Lee v. Habib, 424 F.2d 891, 899 (D.C. Cir. 1970) (psychiatrist); Christian v. United States, 398 F.2d 517, 519 (10th Cir. 1970) (investigator); United States *ex rel.* Robinson v. Pate, 345 F.2d 691 (7th Cir. 1965), *aff'd in part, remanded in part on other grounds*, 383 U.S. 375 (1966) (psychiatrist); People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (handwriting expert); State v. Taylor, 202 Kan. 202, 447 P.2d 806 (1968) (fingerprint expert); State v. Horton, 34 N.J. 518, 170 A.2d 1 (1966) (cocounsel to aid court-appointed attorney); *cf.* Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967) (psychiatric examination); Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965) (psychiatrist); United States v. Germany, 32 F.R.D. 42 (N.D. Ala. 1963) (reimbursement of defense attorney for investigatory expenses).

[51] 36 Ill. 2d 228, 221 N.E.2d 645 (1966).

[52] 221 N.E.2d at 648.

[53] U.S. CONST. amend. VI.

[54] *See* Annot., 77 A.L.R.2d 1182 (1961). Mississippi's view is that an expert witness can be called in the same manner as any other witness when the information sought is conventional, but the court specifically excepted compulsory testimony when the information sought was derived strictly from his field of expertise. Johns-Mansville Prods. Corp. v. Cather, 208 Miss. 268, 281-82, 44 So. 2d 405, 408 (1950).

[55] 18 U.S.C. § 3006A (1970), *as amended*, 18 U.S.C.A. § 3006A(1) (Supp. 1974).

[56] 18 U.S.C. § 3006A(e)(1) (1970). "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application." *Id.*

[57] *Id.* "The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case." Marshall v. United States, 423 F.2d 1315, 1318 (10th Cir. 1970). *See* United States v. Hamlet, 456 F.2d 1284 (5th Cir. 1972), *cert. denied*, 414 U.S. 1026 (1973); Williams v. United States, 310

Under this Act, the indigent is not placed in a position of waiting until time for the hearing to obtain the needed expert or investigatory services; he may retain these services prior to the hearing, subject only to later court approval and a $150 limitation.[60] The total amount for these necessary defense services is limited to $300, but a greater amount may be allowed by the judge or magistrate, contingent on the approval of the chief judge of the circuit.[61] The Criminal Justice Act of 1964 has prompted several states[62] to enact legislation granting defense services. Florida, by far, provides the best plan for indigents; not only is there no dollar maximum,[63] but the partially indigent, as well as the indigent, can receive aid.[64] The majority of states which allow defense services still allow the judge in his discretion to deny an application for defense services.[65] Even

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A.2d 244 (D.C. Ct. App. 1973).

[58] 18 U.S.C. § 3006A(e)(1) (1970). "[T]he court, before authorizing subsection (e) services, must also find 'after appropriate inquiry in an ex parte proceeding that the services *are necessary* . . . .'" Christian v. United States, 398 F.2d 517, 519 (10th Cir. 1968) (emphasis in original). *See, e.g.*, Williams v. United States, 310 A.2d 244, 246 (D.C. Ct. App. 1973).

[59] 18 U.S.C. § 3006A(e)(1) (1970). *See, e.g.*, Williams v. United States, 310 A.2d 244, 246 (D.C. Ct. App. 1973).

[60] 18 U.S.C. § 3006A(e)(2) (1970).

[61] *Id.* § 3006A(e)(3).

[62] ARIZ. REV. STAT. ANN. § 11-586 (Supp. 1974-75) (limited to public defenders in counties with over 100,000 people); CAL. EVID. CODE §§ 730-31 (West 1966); FLA. STAT. § 914.06 (1973); ILL. REV. STAT. ch. 38, § 113-3 (1967) (capital cases only); IOWA CODE ANN. § 775.5 (Supp. 1974-75); KAN. STAT. ANN. § 62-1304 (1964); MD. ANN. CODE art. 27A, § 1 (Cumm. Supp. 1974); MASS. GEN. LAWS ANN. ch. 280, § 4 (Supp. 1975); MINN. STAT. ANN. § 611.21 (Supp. 1975); N.H. REV. STAT. ANN. § 604-A:6 (1974 Repl. Ed.); N.M. STAT. ANN. § 41-22-3 (1972); N.Y. COUNTY § 722-c (McKinney 1972); N.C. GEN. STAT. § 7A-454 (1969); OHIO REV. CODE ANN. § 2941.50 (1975); PA. STAT. tit. 19, § 784 (1964); R.I. GEN. LAWS ANN. § 9-17-19 (Supp. 1974); S.C. CODE ANN. § 17-287 (Cumm. Supp. 1974); TEX. CODE CRIM. PRO. art. 26.05 (Supp. 1974); UTAH CODE ANN. § 77-64-1 (Supp. 1973); WIS. STAT. ANN. § 256.65 (Supp. 1974). While Mississippi provides for compensation of appointed counsel and his actual expenses in MISS. CODE ANN. § 99-15-17 (1972), the courts have never interpreted this to include expenses for expert witnesses or investigators. *See* Bright v. State, 293 So. 2d 818 (Miss. 1974) (concluded majority of states did not provide expert witnesses); Brooks v. State, 242 So. 2d 865, 867 (Miss. 1971) (no statutory authority for the appointment); Laughter v. State, 235 So. 2d 468 (Miss. 1970) (found no precedent for the appointment of a private investigator or expert witnesses at the state's expense); Phillips v. State, 197 So. 2d 241 (Miss. 1967) (neither the United States Constitution nor the Mississippi constitution requires more than appointment of counsel).

[63] FLA. STAT. § 914.06 (1973).

[64] FLA. R. CRIM. P. 3.111(3)(4).

[65] *See, e.g.*, State v. Frames, 213 Kan. 113, 515 P.2d 751, 756 (1973); Commonwealth v. Williams, 301 N.E.2d 683, 687 (Mass. 1973); State v. Frazier, 85 N.M. 545, 514 P.2d 302 (1973); People v. Mencher, 42 Misc. 2d 819, 248 N.Y.S.2d 805 (Sup. Ct. 1964); Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540, 546-48 (1967); Henriksen v. State, 500 S.W.2d 491, 494-95 (Tex. Crim. App. 1973); Watson v. State, 64 Wis. 264, 219 N.W.2d 398, 404-05 (1974). Most often when state-financed defense services are denied, the court justifies the denial by stating that there was no showing of necessity. *See, e.g.*, State v.

without statutes, some state courts have justified paying for these defense services on the basis of the inherent power of the court.[66] The Mississippi Legislature recently enacted a local law allowing Harrison County to establish a public defender system.[67] This will be the second public defender system in Mississippi, the first being in Washington County.[68] The Harrison County Public Defender office, unlike the Washington County system, specifically calls for investigatory personnel,[69] although they are to be paid from public grants from agencies[70] and not from the $25,000 budgeted from the county. There are several local bills before the Mississippi Legislature now to create more county public defender offices.[71] Since the Harrison County Public Defender system has provisions for investigatory and other necessary services,[72] this program will meet the currently suggested standards for defense services.[73]

In the instant case, the Ninth Circuit held that since due process requires that necessary investigative services be provided to an indigent defendant, and since the burden of establishing that such services are necessary is upon the defendant, a denial of these services will be a violation of due process only where the defendant can show, by clear and convincing evidence, substantial prejudice to his case. Speaking to the petitioner's equal protection argument, the court held that as an investigative service or fund for an indigent is not a fundamental

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Frazier, 85 N.M. 545, 514 P.2d 302, 303 (1973); People v. Pride, 79 Misc. 2d 581, 360 N.Y.S.2d 572, 574 (Sup. Ct. 1974); Watson v. State, 219 N.W.2d 398, 405 (Wis. 1974).

[66] *E.g.*, State v. Taylor, 202 Kan. 202, 447 P.2d 806, 809 (1968); State v. Horton, 34 N.J. 518, 170 A.2d 1, 9 (1966). *But see* State v. Bourne, 283 So. 2d 233 (La. 1973); Brooks v. State, 242 So. 2d 865 (Miss. 1971); Phillips v. State, 197 So. 2d 241 (Miss. 1967). The Mississippi Supreme Court recently proclaimed its inherent rule-making power. Newell v. State, 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975).

[67] Act of Jan. 8, 1975, ch. 979 §§ 1-13 [1974] Local and Priv. Laws Miss. 150.

[68] Act of May 4, 1972, ch. 867 §§ 1-10 [1972] Local and Priv. Laws Miss. 41. The Mississippi Senate in 1968 proposed a bill which would have allowed expert and investigatory assistance to indigents at county expense if it were determined in an ex parte hearing that these services were necessary. Senate Bill No. 1903 § 10 *found in* Wise, *Right to Counsel for Indigent Defendants in Mississippi*, 40 MISS. L.J. 187, App. II at 204 (1968). However, this bill failed to get the approval necessary to become law. *See* Wise, *supra* at 198.

[69] Act of Jan. 8, 1975, ch. 979 § 10 [1974] Local and Priv. Laws Miss. 150. The Washington County Public Defender has one investigator although this position was not specifically mentioned in the private bill used for its creation. Telephone interview with James Pierce, Senior Courts Specialist, Office of the Governor, Division of Justice in Jackson, Mississippi, March 17, 1975.

[70] One such grant is from the Law Enforcement Assistance Administration. The usual procedure for LEAA grants is to make the state pay 5 percent of the project, the county 5 percent, and LEAA to fund the final 90 percent. The federal support is gradually phased out by the LEAA until the county is paying for the full system. *Id.*

[71] *Id.*

[72] Act of Jan. 8, 1975, ch. 867 § 10 [1974] Local and Priv. Laws Miss. 150.

[73] *See* ABA, *supra* note 22, at 22; NAT'L ADVISORY COMM'N, *supra* note 17, at 280; UNIFORM LAW COMM'RS, MODEL DEFENSE OF NEEDY PERSONS ACT § 2 *found in* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES App. E (1967).

right protected by the Constitution, and as a conflict of interest is a rationally connected reason for the State of Arizona to deny access to its public defender system, then the requirement that necessity be shown before obtaining investigative funds is a fundamentally fair and equivalent substitute for the reasonable legislative restrictions placed upon the public defender's investigative funds. The court concluded that without a showing of substantial prejudice by clear and convincing evidence the equal protection standard is not breached.

In the instant case the court stated a workable standard for determining the exigencies of criminal defense services for the indigent. The standard is necessity. On appeal, necessity may be shown by proving substantial prejudice to the indigent. Although some may feel that this standard is too restrictive, when balanced against the tremendous state expense involved it is a just compromise. The Ninth Circuit is thus applying the same standard to the state courts that applies to the federal courts. Considering that all federal courts are subject to the Criminal Justice Act of 1964[74] and thereby have easy access to expert witnesses and investigators, *Mason* can be interpreted as an ominous warning to the states to make preparations for providing these defense services. Twenty states,[75] on their own initiative, have established some type of criminal defense service program. A majority of states, including Mississippi, however, have flatly refused to institute defense service systems.[76] If these services are not needed, as these courts have indicated, then why do the affluent readily seek such services in connection with their cases? The true reason for denying these services is probably fear of the great expense involved in providing every indigent defendant with such services. The instant decision, however, lightens the states' burden somewhat by requiring that the defendant prove necessity before these services are granted. *Miller v. Pate*,[77] a leading case, demonstrates when the defendant may meet the standard of necessity. In *Miller*, the defendant's conviction on charges of rape and murder was based primarily upon circumstantial evidence, including the testimony of an expert witness. The state's expert testified that the stain found on the defendant's shorts was the blood of the victim.[78] The testimony went unchallenged because the defendant was financially unable to provide an expert of his own. Later, in a federal hearing for a writ of habeas corpus, it was determined by an expert for the defense that the

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[74] 18 U.S.C. § 3006A(e) (1970).

[75] *See* note 62 *supra*.

[76] *E.g.*, Knapp v. Hardy, 523 P.2d 1308 (Ariz. 1974) (state had to use expert to convict defendant and reports were available to him); Alexander v. State, 516 S.W.2d 368 (Ark. 1974) (no constitutional right where state provides expert witness); Gunter v. State, 223 Ga. 290, 154 S.E.2d 608 (1967) (no authority requiring appointment of psychiatrist); Bimbow v. State, 315 N.E.2d 738 (Ind. App. 1974) (statute does not require private psychiatrist at state expense); State v. Bourne, 283 So. 2d 233 (La. 1973) (no constitutional mandate); Phillips v. State, 197 So. 2d 241 (Miss. 1967) (neither the United States nor Mississippi constitution requires more than legal assistance of counsel); Trowbridge v. State, 502 P.2d 495 (Okla. 1972) (did not deprive of constitutional right to adequate representation).

[77] 386 U.S. 1 (1966).

[78] *Id.* at 4.

stain was paint, not blood, and the defendant was set free.[79] *Miller*, hopefully, is not typical of the majority of cases that come before our trial courts; yet, there are a number of cases in which the defendant needs more help than can be provided by appointed counsel. The Mississippi Legislature has at least recognized that defense services are needed by providing for them in the establishment of the Harrison County Public Defender Program, even though it did not directly fund those services.[80] In 1968, an attempt was made in the Mississippi Legislature to establish a statewide public defender program with defense services, but the measure failed to gain enough support for passage.[81] Now, with the federal courts closely examining state cases, perhaps it is time for the legislature to re-examine the state's position on defense services. There are three basic approaches the legislature could take to rectify the problem. First, the legislature could adopt a state-wide public defender system and attach the investigatory services as part of the state-supported defense services. Second, it could institute county option systems and include the investigative expenses within the expenses of the county system. Third, the legislature could allow the choice of either the county system or appointed attorneys but provide the services of a state-wide investigatory service for both. Since Mississippi has allowed some counties to establish a county system, while allowing others to continue appointing attorneys, this discussion will address the third proposal. Statistics for the period through September 30, 1967, show only 1 percent of the cases requiring appointment of counsel requested the services of investigators or experts under the Criminal Justice Act of 1964,[82] indicating there would be no necessity for a large number of investigators. Therefore, as few as three or four investigators might be able to serve the entire state. Before an indigent could receive the aid of an investigator, the indigent would have to go before the trial judge and state why the assistance was needed. Upon a showing of necessity, in an ex parte hearing, the investigator would be appointed to the case. The county where the trial is to be held should pay his expenses, leaving the state to pay only the investigator's salary and office expenses. If a Law Enforcement Assistance Administration (LEAA) grant could be obtained by the state to aid this program, in the first year LEAA would pay 90 percent of the cost of operation for the entire project. This money, in addition, could be used to furnish the investigator's office with equipment. At the present time LEAA funds, on a regular basis, a law school intern program.[83] These interns work with prosecutors and public defenders in the state.[84] If LEAA could develop a similar program for law enforcement majors at our state universities, then these students could be assigned to the special defense investigators. Not only would the interns gain valuable experience by practical application of their skills, but they would also be render-

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[79] *Id.* at 5.

[80] Act of Jan. 8, 1975, ch. 979 § 10 [1974] Local and Priv. Laws Miss. 150. See text accompanying note 68 *supra*.

[81] *See* Wise, *supra* note 66.

[82] Christian v. United States, 398 F.2d 517, 518 n.2 (10th Cir. 1968).

[83] LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1974 MISSISSIPPI COMPREHENSIVE PLAN c-44 to -45 (1974).

[84] *Id.*

ing a valuable service by allowing the state to operate an inexpensive, efficient defense investigatory service. This project, if funded in a similar manner to the law school intern program, would cost the state only 10 percent of the total cost.[85] This project could even save the counties money if managed properly. First, it could save the counties money by having a professional investigator's services (interviewing witnesses and gathering evidence) which are cheaper than those of attorneys. Second, a professional investigator in many cases might gather sufficient evidence to cause the charges to be dropped, thus saving the county the cost of prosecuting the defendant at trial.

The Mississippi Crime Detection Center and Medical Examination Center[86] and the State Chemical Laboratory,[87] already available to prosecutors, are other possible sources of expert witnesses and services for the indigent defendant. In order to avoid a conflict of interest, new personnel would have to be assigned to these centers to handle only defense requests for assistance. If these established institutions were utilized by both the state and the indigents, there would be minute added expense for the state compared to the benefits received. These services would probably be the most demanded defense services. Since there will not be great expense involved, nor a great deal of time consumed, the indigent should be allowed ready access to these institutions. In every situation where the prosecutor uses these services, an automatic right to use these same facilities should be conferred upon the indigent. There are many instances where experts, other than the ones employed by the state, might be needed by the indigent defendant. In these situations the only solution is to require the indigent to make a showing of necessity, and, upon this showing, require the county to pay for the experts. One way to cut costs in this situation is to allow the trial judge to set a reasonable fee for the expert's services.

The Mississippi Supreme Court needs to reevaluate its position on indigent defense services. The court in *Bright v. State*[88] and *Phillips v. State*[89] indicated that there are no circumstances in which an indigent would be entitled to defense services at state expense. In *Kelly v. State*,[90] however, the court found no problem in granting an interpreter to the defendant in order to assure him a fair trial. Surely, the court must realize there are other situations in which a lack of necessary defense services will result in the denial of due process. The Mississippi court should use its inherent rule-making power[91] to force the counties to provide minimum levels of defense services until the state legislature acts. Without such a positive decision, the court will be inviting the indigent criminal defendant to seek federal habeas corpus relief based on a denial of due process. Like its closely analogous counterpart, right to counsel, defense services will probably continue to make inroads on state procedure until a minimum stan-

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[85] *Id.* at c-45.

[86] Miss. Code Ann. § 45-1-17 (1972).

[87] Miss. Code Ann. § 57-21-1 to -15 (1972).

[88] 293 So. 2d 818 (Miss. 1974) (indigent defendant denied assistance of independent chemist at county expense to analyze substance charged to be marijuana).

[89] 197 So. 2d 241 (Miss. 1967) (denial of psychiatric services at state's expense).

[90] 278 So. 2d 400 (Miss. 1973).

[91] Newell v. State, 308 So. 2d 71 (Miss. 1975), *noted in* 46 Miss. L.J. 849 (1975).

dard of defense services is made mandatory on the states by the federal courts. To appoint an attorney to serve an indigent criminal defendant and deny him the tools necessary to ensure that defendant an adequate defense is worse than refusing to appoint an attorney. In the absence of an attorney there is no problem in deducing that a defendant is being denied his basic rights, while many courts feel that once an attorney is appointed the standard of "effective" counsel has been reached. The Fifth Circuit has stated that an appointed attorney should approach the same competence as an attorney of one's own choosing.[92] Thus, if Mississippi and its sister states are to meet this standard, they must develop programs that will assure the indigent criminal defendant the opportunity to procure these necessary services.

Charles Edward Sorey II

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[92] Calloway v. Powell, 393 F.2d 886, 888 (5th Cir. 1968).

BOOK REVIEWS

THE NOMINALISTIC PRINCIPLE: A LEGAL APPROACH TO INFLATION, DEFLATION, DEVALUATION AND REVALUATION

By ELIYAHU HIRSCHBERG.
Jerusalem, Israel: Daf-Chen Printing Press. Pp. 134.

*M. Jack Beasley, Jr.**

How much is our dollar worth today? This question is and has been puzzling workers, economists, bankers, and businessmen for many years, but perhaps their curiosity is being channelled in the wrong direction. Eliyahu Hirschberg contends that the important question is actually, "What difference does the inflated or deflated value of the dollar make anyway?"

Probably every attorney working with contract law is faced with the settlement problems arising from the question of the current value of the United States dollar. However, the courts, historically, have held true to the nominalistic rule when considering contract settlements and disputes, the nominalistic rule being, that a dollar (or any currency unit) is a dollar.

Nominalism is a vital part of the success of the monetary system in the United States. When unrestricted by a metallic standard, the government retains tremendous powers through its ability to issue additional, like means of payment in the event the current money supply is not sufficient to maintain the economy. Under our present system, this flexibility is necessary if the economy is to be able to survive population increases and normal increases in the overall level of business. Realistically, the state is burdened with the responsibility of maintaining the facilities of the country, operating the business of the country, and making the payments necessary to accomplish these objectives. With the only source of revenue to the state being tax receipts, the state must, to an extent, control this income by adjusting the level of monies outstanding on which tax may be levied. This justifies the creation of new money.

Hirschberg's book is centered around the question of what effect the devaluation of currency has on an individual's worth or value when accepting payment of devalued currency. Hirschberg contends that this loss of value (if it actually is a loss) is only an equitable method of distributing the cost of state which cannot be covered by normal revenue of the state, this idea being founded on the idea that the people must pay for what they demand from the state.

When the gold standard was dropped in the United States, the world adopted the policy of basing any currency exchange on gold reserves, reserves being utilized not as a medium of exchange, but as a control measure only. Obviously, the physical movement of large quantities of gold, internationally, is more than impractical. Thus, the foregoing system was adopted, with much success. Therefore, in the absence of value backed by a metal, the value of currency is measured in terms of purchasing power.

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As one would notice, Hirschberg is of the opinion that value losses to individuals arising from devaluation of currency by the state is a normal burden of those individuals. One method of compensation which is brought out in the book is valorism. Valorism deals with the problem of the sum vs. value. This concept possibly would be more familiarly spoken of in such terms as price level adjustments and price index adjustments. This approach has obvious merits. Valorism, however, is impractical from a realistic point of view. Any satisfaction afforded one party under valorism is in turn, passed on as hardship to another.

If these hardships are valuistically justifiable, however, the end result is socially unacceptable. Socially, valorism is regressive by nature. Valorism has many connotations of the old barter system; fair, but not practical in our world today. Further, valorism is possibly more inflationary than devaluation has proven to be.

Another alternative is known as revaluation. The adverse effects of this method can be recalled by considering the abolishment of the currency issued by the Confederate States of America. At that time, the problem was dealt with under the nominalistic principle quite successfully. Revaluation has become history in Germany, also. Revaluation is normally a legislative decision.

The underlying problems in revaluation are those affecting the creditor, this being due to the fact that currency is primarily used to satisfy (or liquidate) debt. Under the assumption that most purchases are on credit, a revaluation, at any point in time, would jeopardize the financial condition of the creditors more than any one else.

The pros and cons of valorism vs. nominalism vs. revaluation are many. Oddly enough, most of these arguments and defenses are right. The question to be dealt with, however, is not that of right or wrong, but the problem of determining who is to suffer the cost of inflation. The logical answer is that the cost should be absorbed by the responsible party: in this case, the people (you and I).

Nominalism, in the long run, causes no real loss to any one. Losses incurred today are usually recovered tomorrow when again, assets are exchanged. More importantly, though, inflation (devaluation) is very real and must be simply accepted. No economic system can survive without growth and, as pointed out earlier, growth is measured in terms of money. By nature, money is a unit of measure, a store of value, a standard for deferred payment, and a medium of exchange. As a medium of exchange, money is used not only to purchase goods and services but to pay salaries and wages. As the prices of goods and services increase, the level of salaries and wages increase. Naturally these increases are not simultaneous, and therein lies the problem. Accountants, bankers, economists, and lawyers diligently search for an answer to this problem which this writer feels lies solely in the attitude of all people. The system is sound; the only trouble occurs when the people who make it a success begin to question this soundness.

PARTIAL JUSTICE
BY WILLARD GAYLIN, M.D.*
New York: Alfred A. Knopf. 1974.
Pp. xxiv, 244. $7.95.

*Francis McRae Turner, III***

Subtitled "A Study of Bias in Sentencing," *Partial Justice* is an attempt, in the author's words,

> to demonstrate how, in even the most fair-minded of individuals, their values, their life-styles, their background, their current life experiences, in other words, their biases, are necessary and inevitable intrusions into the processes of discretion.[1]

The author uses interviews with judges which span a wide range of political persuasions and backgrounds (from a self-proclaimed Marxist to a conservative, middle-class Black) to illustrate his conclusions. He also draws upon his own background as a psychiatrist to show how each factor influences the sentencing process. The author contends that differences in bias cause judges to have differing interpretations of the following concepts: The "proper" minimum sentence (one judge's maximum was what another judge felt to be the proper minimum), the propriety and efficacy of rehabilitation as an element of the prison process, the role of retribution in criminal sentences, the relative evils of crimes against the person (which all the judges felt warranted a relatively harsh sentence), crimes against property (which the Marxist judge felt was a proper redistribution of wealth), and victimless crimes, such as drug possession, prostitution, and pornography (which Catholic judges felt deserved harsher sentences).

In a separate chapter the author deals briefly with the problem of discretion in its larger aspects, particularly focusing on prosecutorial discretion, the open-ended juvenile court sentencing process, and the problems of discretionary enforcement by police. The author states: "To remove discretion from the judges only to give it to the policeman or jailer is not likely to enhance the quality of justice."[2] In this same chapter the author views proposals to codify the sentencing process through the use of mandatory, irreducible sentences. He also discusses the California experiment with indeterminate sentences:

> With the indeterminate sentence, rehabilitation was used as a rationalization for heaping punishment on punishment. While there may be a useful role for punishment in a judicial system, it must never be disguised as reform.[3]

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[1] W. GAYLIN, PARTIAL JUSTICE vii (1974).
[2] *Id.* at 193.
[3] *Id.* at 193-94.

In the final chapter the author presents conclusions about the sentencing process. Having spoken of the greater evil of pushing discretion to the pretrial level, the author concludes: "We must mechanize justice because we are not yet up to the love and understanding that is essential if discretion is to serve justice."[4] In a general way, this conclusion may be correct, but it is contradicted by the author's own admissions as to the impossibility of eliminating discretion at the lower levels of the enforcement process, particularly police discretion in enforcement or apprehension. Nonetheless, the author has made a set of proposals for improving the sentencing process which deserve attention regardless of the logic of his conclusion regarding the mechanization of justice. The author proposes five changes in the present sentencing process which he feels are "a minimum program to restrict the influence of blatant bias, to enhance the sense of fairness, and to introduce a greater measure of justice into 'the processes of justice;' "[5] these proposals are: (1) a sentencing follow-up procedure, (2) a statement of sentencing reasons, (3) appellate review of sentences, (4) constriction of sentencing discretion and increased gradation of punishments, and (5) massive decarceration.[6]

Dr. Gaylin, like the judges whose viewpoints he appears to favor, was apparently reared in the liberal, humanist tradition and *his* bias is revealed in his analysis and conclusions. His proposals, regardless of bias (his or the reader's), are thought-provoking and important. While recognizing that the rehabilitative model for incarceration has failed, the author and the judges interviewed are at a loss to supply a persuasive rationale to support the system as presently constituted. If for no other reason, the book should be read and discussed to try to resolve this impasse. Of equal importance is the author's discussion of plea-bargaining, a topic pursued with each judge interviewed and throughout the book. Finally, the author points to the lack of any authoritative study of the effect of discretion in the criminal justice system as a whole; the last attempt was published in 1958,[7] although one noted writer has dealt with the problem in several writings in recent years.[8] In short, Dr. Gaylin's book is worth reading, not as an authoritative discussion of bias or discretion in the law, but as a basis for discussion and rumination regarding the roles of discretion and bias in enforcement and sentencing and the purposes and goals of the entire criminal justice system.

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[4] *Id.* at 232-33.

[5] *Id.* at 225.

[6] *Id.* at 225-32.

[7] G. ALLPORT, THE NATURE OF PREJUDICE (1958).

[8] K. DAVIS, DISCRETIONARY JUSTICE (1969).

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KNOWLEDGE AND POLITICS. By Roberto Mangabeira Unger. New York: The Free Press—A Division of Macmillan Publishing Co. 1975. Pp. 336. $12.95.

AN INTELLECTUAL PROPERTY PRIMER. By Earl W. Kintner & Jack L. Lahr. New York: Macmillan Publishing Co. 1975. Pp. 539. $12.95.

AMERICA'S CONTINUING REVOLUTION: AN ACT OF CONSERVATION. Washington: American Enterprise Institute for Public Policy Research. 1975. Pp. 398. $12.00.

A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION. By Harold M. Hyman. Boston: Houghton Mifflin Co. 1975. Pp. 562. $6.95.

CONSUMER CREDIT COMPLIANCE MANUAL. By John R. Fonseca. Rochester: The Lawyers Co-operative Publishing Co. 1975. Pp. 787. $35.00.

WHAT YOU MUST KNOW TO MANAGE A CHARITABLE FOUNDATION. By Stanley Pressment. Greenvale, N.Y.: Panel Publishers. 1975. Pp. 1003. $99.00.

Books appearing in this section may be reviewed at a later date.

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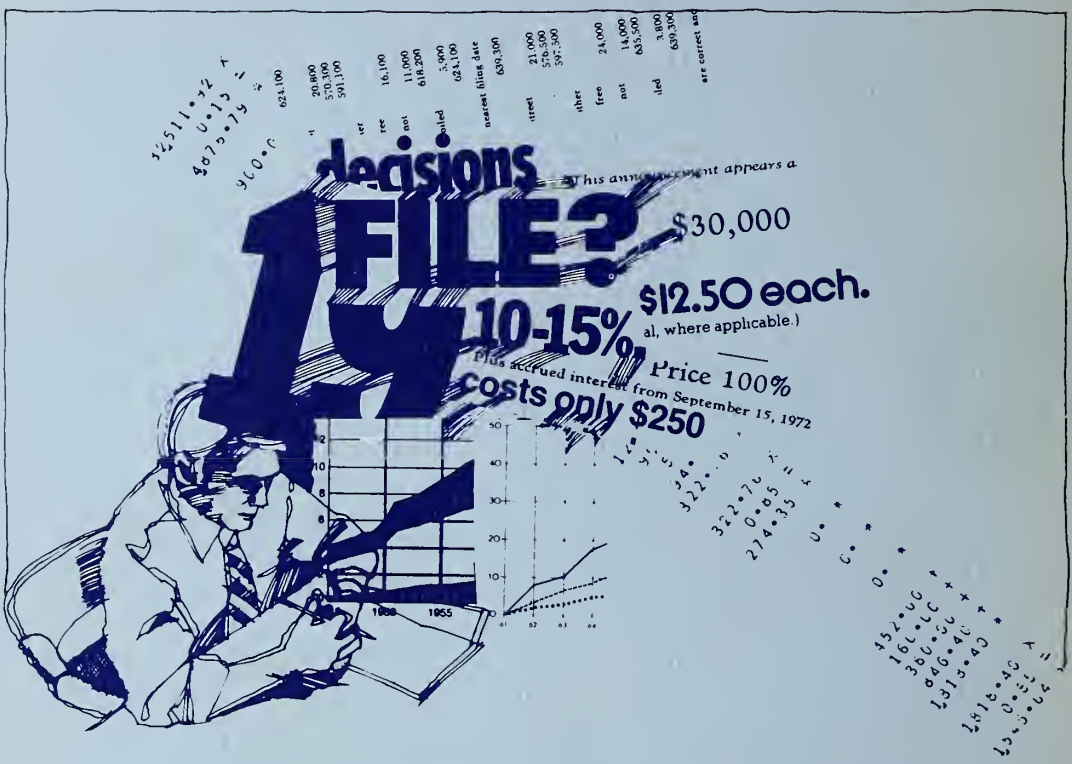

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